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NO.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

ARTHUR J. MIER, an individual,

Petitioner,

vs.

GLEN W. VAN DYKE, in his capacity as Adjutant General of the Arizona State Army National Guard; **TOGO D. WEST, JR.**, in his capacity as Secretary of the Army,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Title VII, 42 U.S.C. § 2000e, protects the civil rights of National Guard technicians.

2. Whether racial discrimination and civil rights violations by the National Guard against a civilian technician are beyond judicial remedy under the justiciability doctrine.

PARTIES TO THE PROCEEDING

The parties before the Ninth Circuit Court of Appeals were the plaintiff, Arthur J. Mier, an hispanic civil service technician in the Arizona State Army National Guard (hereinafter "AANG"); and the defendants, Donald L. Owens,[1] in his capacity as Adjutant General of the AANG, and Togo D. West, Jr., in his capacity as Secretary of the Army.[2]

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[1]Glen W. Van Dyke is substituted for his predecessor Donald L. Owens, as Adjutant General of the AANG, pursuant to Sup. Ct. R. 35.3.

[2]Togo D. West, Jr., was substituted for his predecessor, Michael P.W. Stone, who was an original defendant in the case below, pursuant to Fed. R. App. P. 43(c)(1).

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REPORTS OF OPINIONS*

Arthur J. Mier v. Donald L. Owens, et al., United St es District Court, District of Arizona, No. CIV-92-0745-PHX-PGR (1993).**

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*Reproduced in Appendix.
**Not published.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The opinion of the Ninth Circuit Court of Appeals sought to be reviewed herein was entered on June 9, 1995.

2. Petitioner's Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied on August 24, 1995.

3. Jurisdiction to review the judgment by writ of certiorari is based on 28 U.S.C. § 1254.

STATUTES AND REGULATIONS INVOLVED*

Federal Statutes

5 U.S.C. § 102

5 U.S.C. § 7511(b)

28 U.S.C. §§ 1331 and 1346

32 U.S.C. § 101(2) - (4)

32 U.S.C. § 101(12)

32 U.S.C. § 101(19)

32 U.S.C. § 709

32 U.S.C. § 709(a)

32 U.S.C. § 709(a)(2)

32 U.S.C. § 709(b)

32 U.S.C. § 709(d)

32 U.S.C. § 709(f)

42 U.S.C. § 2000e

42 U.S.C. § 2000e-3

42 U.S.C. § 2000e-5

42 U.S.C. § 2000e-16

42 U.S.C. § 2000e-16(a)

*Reprinted in the Appendix.

STATEMENT OF THE CASE

Arthur J. Mier (hereinafter "Mier") is an hispanic civil service technician[3] who has served in the Arizona Army National Guard (hereinafter "AANG") for over twenty-three years. As a civil service technician, Mier serves both in a military capacity, as a commissioned officer not on active duty,[4] and in a civilian capacity, as a full time Supply Management Officer. Mier's primary role is civilian in nature. As a Supply Management Officer, he is responsible for the maintenance, repair and provision of all supplies issued to the AANG.[5] As a condition of holding the civilian position, Mier is required to be a member of the AANG, fulfill the requisite obligations and responsibilities as an officer, and hold the military grade commensurate with his civil service position.[6]

In 1986, Mier filed an Equal Employment Opportunity ("EEO") complaint with the AANG alleging discrimination based on his race, color and national origin. He prevailed on that complaint. Since that time, ranking officers in the AANG (collectively, for purposes of this

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[3]32 U.S.C. § 709(a) defines Mier's position as a "technician," and 32 U.S.C. § 709(d) states that as a technician, Mier is both an employee of the Army and an employee of the United States.

[4]32 U.S.C. § 101(12) defines "active duty" as full-time duty in the active military service of the United States. Section 101(19) defines "full-time National Guard duty" as training or other duty other than inactive duty, performed by a member of the Army National Guard of the United States.

[5]*See* 32 U.S.C. § 709(a)(2).

[6]32 U.S.C. § 709(b).

Petition, all discriminating officers are encompassed by reference to "AANG") have continued their discrimination and retaliated against Mier for filing the 1986 complaint. The AANG's retaliation and general harassment, prompted Mier to file a second EEO complaint on August 14, 1991 for discriminatory retaliation, on the grounds that the AANG (1) failed to complete required performance appraisals, (2) subjected him to unwarranted investigations based on his civilian job performance and duties, (3) denied him a promotion to the rank of Major, and (4) initiated a groundless proceeding to withdraw his federal recognition.[7] After Mier exhausted his administrative remedies, he instituted the current litigation.

Mier filed his complaint in the United States District Court for the District of Arizona on April 17, 1992. Jurisdiction in the district court was based on 28 U.S.C. §§ 1331 and 1346, as well as 42 U.S.C. §§ 2000e-5 and 2000e-16, because Mier's claims arose under federal law and involved the United States or an agency or department thereof as a defendant. The defendants filed their answer on July 2, 1992. On August 10, 1992, defendants filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief could be

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[7]"Federal recognition is the acknowledgement by the Federal Government that an officer [of the state militia] appointed, promoted, or transferred to an authorized grade or position vacancy in the Army National Guard meets the prescribed laws and regulation governing the action. National Guard Regulation 600-100, Par. 1-3(b). The loss of federal recognition means that the officer no longer participates in federally-paid duty status, which includes activities such as drills, annual training, or service schools at any cost to the federal government, nor may he be called into active federal service." *Frey v. California*, 982 F.2d 399, 400 n.3 (9th Cir. 1993), *cert. denied*, 61 U.S.L.W. 3852 (1993).

granted. Mier filed his response on September 15, 1992. Defendants filed their reply memorandum on September 30, 1992, and a motion to supplement, on March 2, 1993. The district court entered an order granting defendants' motion to supplement on March 3, 1993. On April 12, 1993, the Court granted defendants' motion to dismiss and ordered that the complaint be dismissed in its entirety. (Appendix, pp. A-15 through A-17) Mier timely filed a notice of appeal on May 5, 1993.

The Ninth Circuit Court of Appeals, with a divided panel, affirmed the dismissal. Its opinion was filed on June 9, 1995. (Appendix, pp. A-3 through A-14) A timely petition for rehearing and suggestion for rehearing *en banc* were filed with the Ninth Circuit on July 24, 1995. The Court denied a rehearing by its order dated August 24, 1995. (Appendix, pp. A-1 through A-2)

Although the nature and extent of the retaliatory and discriminatory actions against Mier by officers of the AANG are egregious and relevant, a detailed recitation[8] of those actions is not critical to this Court's resolution of the conflict among the circuit courts and settlement of the issues as to whether discrimination and civil rights violations by the National Guard against its civilian employees are within the scope of Title VII and justiciable.

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[8]The specific acts of retaliation and discrimination are set forth in the Brief of Plaintiff/Appellant before the Ninth Circuit.

ARGUMENT

We ask this Court to grant this Petition because the case presents two issues of first impression: (1) whether Title VII, 42 U.S.C. § 2000e, applies to National Guard technicians, and (2) whether a National Guard technician's civil rights claims under 42 U.S.C. § 2000e are justiciable.[9] With regard to the first issue, the Ninth Circuit, in affirming the lower court's action, found that Title VII did apply to National Guard technicians, but the it employed a test that unduly and prejudicially narrows the circumstances in which Title VII applies. With respect to the second issue, the Ninth Circuit found that the actions about which Mier complained were "integrally related to the military structure" and, therefore, nonjusticiable, a holding that is inconsistent with the purpose and history of Title VII.

In addition, the circuit courts have addressed these issues and reached conflicting results. For example, as discussed *infra*, the Eighth, Ninth, Tenth, and Eleventh Circuits all apply Title VII differently to National Guard technicians. One circuit refuses to apply Title VII at all. With regard to the justiciability issue, the circuits are divided. Some have not squarely addressed the issue of the reviewability of a National Guard technician's claims under Title VII. Of those that have addressed the issue, some have determined such claims to be reviewable, while others have refused to allow such claims. In addition, some circuits have found all claims made by military personnel to be nonjusticiable, while others have deemed claims for

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[9]For the current budget year it is projected that there will be a total of 63,528 people employed as military (civilian) technicians in the Army Reserve, Air Force Reserve, Army National Guard and Air National Guard. 141 Cong. Rec. H9466 (daily ed. Sept. 25, 1995).

injunctive or other equitable relief to be justiciable. The lower courts have each applied their own interpretations of this Court's decision in *Chappell v. Wallace* and devised their own standards for determining justiciability. For all of these reasons, Petitioner respectfully requests that the Court accept review of this case.

FEDERAL COURTS SHOULD APPLY TITLE VII TO PROTECT THE CIVIL RIGHTS OF NATIONAL GUARD TECHNICIANS

A. The Circuit Courts Inconsistently Apply Title VII to National Guard Technicians.

There are instances, in both the circuit and district courts, where Title VII has been readily applied to technicians, and, in some cases, even to full-fledged members of the military. Regrettably, the Supreme Court has not addressed the issue in the National Guard context, and the circuit courts are anything but consistent in their opinions and holdings.

This case illustrates the Ninth Circuit's gradual acceptance and affirmation of the application of Title VII to National Guard technicians. *See Mier v. Owens*, 57 F.3d 747, 748-50 (9th Cir. 1995). Other circuits have not been so generous. The Eighth Circuit has noted that "'neither Title VII nor its standards are applicable to persons who enlist or apply for enlistment in any of the armed forces of the United States.' [Citation omitted]. We do not see any significant distinction, for Title VII purposes, between a member of the Army or Air Force and a member of . . . the National Guard." *Taylor v. Jones*, 653 F.2d 1193, 1200

(8th Cir. 1981).[10] The Eleventh Circuit, while leaving some question as to the scope of its holding, declared that "a member of the National Guard [] is not an employee of the state of Alabama for purposes of Title VII." *Stinson v. Hornsby*, 821 F.2d 1537, 1539-40 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988). The court alluded to a balancing test to determine whether a technician is more military personnel or state employee for purposes of applying Title VII. *Id.* at 1540, 1541. Such a test, if the court was employing it, is entirely inconsistent with the approach and analysis taken by the Ninth Circuit in *Mier*. *See Mier*, 57 F.3d at 748. ("We conclude that Title VII applies to Guard technicians except when they challenge personnel actions integrally related to the military's unique structure." *Id.*) The Eleventh Circuit focused on the role of the technician; whereas the Ninth Circuit evaluated the nature of the actions taken against Mier.

The Tenth Circuit appears to be more lenient in allowing a Title VII action by a technician, even when the alleged discrimination is based on "officer efficiency ratings" and arguably a failure to promote. *See Thornton v. Coffey*, 618 F.2d 686 (10th Cir. 1980). In this sense, it more closely parallels the Ninth Circuit. But regardless of how closely one circuit parallels another, there are clear differences in the law as they apply it. There is a need for uniformity, and the issue should be settled by the Supreme Court.

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[10]The Eighth Circuit appeared willing to recognize a Title VII violation with respect to the plaintiff's exclusively civilian job conditions. *But see id.* at 1201 n.6.

The unique circumstances of National Guard technicians attempting to remedy discrimination was illustrated in *Hunter v. Stetson*, 444 F. Supp. 238 (E.D.N.Y. 1977). The district court alertly observed that the defendants could exploit their dual civilian/military status and attempt to shield their wrongful conduct by arguing that it was strictly military. The plaintiff, a federal civilian employee, who was also a National Guardsman, brought a Title VII action on the ground that his military rank had been reduced as a reprisal for having participated in proceedings on a discrimination complaint filed against the National Guard by one of its other civilian employees. *Id.* at 238. The court refused to dismiss the complaint on defendants' motion, which was similar in many respects to the motion that was filed in the district court in this case.

> . . . I read the complaint as alleging improper action on the part of plaintiff's *civilian* employers; i.e., exploiting their dual status as plaintiff's military and civilian superiors to pervert the military decision-making process. And this was allegedly done with the intent of furthering goals in the realm of civilian employment: i.e., discouraging the processing of discrimination complaints.
>
> It is the dual status of the Guard's employee-members that presents the difficult questions on this motion. . . .
>
> However, . . . the complaint states a cause of action cognizable under Title VII. Plaintiff contends that the act which precipitated a reduction in his military rank . . . was committed within the scope of his civilian employment, and that it is only by

> virtue of the fact that his superiors in the Guard wear two hats that they were able to mete out punishment in the form of a reduction in military rank. . . . Had the retaliation taken place in the civilian sphere, civilian redress would of course have been available to plaintiff.

Id. at 239-240 (emphasis original). *Hunter* illustrates Title VII's applicability to the case at bar, and, more important, it highlights the unique and difficult position in which technicians will remain if this Court does not grant *certiorari* and settle this area of the law.

B. Title VII Applies to National Guard Technicians.

Title VII applies to "[a]ll personnel actions affecting *employees* or applicants for employment (except with regard to aliens employed outside the limits of the United States) *in military departments* as defined in Section 102 of Title 5 . . . ."[11] 42 U.S.C. § 2000e-16(a) (emphasis added). "A technician employed under subsection (a) [of the National Guard Technicians Act] is an *employee of the Department of the Army* or the Department of the Air Force, as the case may be, and an employee of the United States." 32 U.S.C. § 709(d) (emphasis added). Although a technician may be a "member of the National Guard," 32 U.S.C. § 709(b), he

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[11]The military departments are defined as the Department of the Army, Department of the Navy, and Department of the Air Force. 5 U.S.C. § 102.

or she is not necessarily a member of the "armed forces."[12]

Moreover, as employees of a military department, the only standard protections that technicians are not entitled to are spelled out in the statute. "Sections 2108, 3502, 7511 and 7512 of Title 5 do not apply to any person employed under this section." 32 U.S.C. § 709(f). Section 2108 defines veterans and veteran status; section 3502 pertains to the order in which civil service employees will be retained when the work force is reduced; sections 7511 and 7512 relate to certain actions taken against federal employees. If technicians were to be treated as regular military, they would not need to be expressly excluded from these statutes along with members of the foreign service, C.I.A., Postal Service, F.B.I., etc. To hold otherwise would render the statutory language in 32 U.S.C. § 709(f) and 5 U.S.C. § 7511(b) superfluous -- a result discouraged in statutory interpretation. *Astoria Federal S & L Assn. v. Solimino*, 501 U.S. 104, 107 (1991). Furthermore, since Congress specified four specific provisions that did not apply to technicians, it is reasonable to conclude that if Congress had intended for technicians to be deprived the benefits of 42 U.S.C. § 2000e-16, it would have made an express provision to that effect. With respect to *technicians* in the National Guard only, when Congress specified the provisions of federal law that would not apply to them, it did not include Title VII. The omission means that, although traditional members of the armed forces may have to endure harassment and discrimination without judicial recourse, Mier does not.

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[12]The National Guard Act makes the distinction between "armed forces," which "means the Army, Navy, Air Force, Marine Corps and Coast Guard," and "National Guard," which is defined separately from the "armed forces." 32 U.S.C. § 101(2) - (4). Nevertheless, by virtue of section 709(d), a technician remains an *employee of the department*.

C. The Legislative History Demonstrates that Racial Discrimination and Other Civil Rights Violations Against National Guard Technicians Are Within the Scope of Title VII Protection.

When the special status of technicians is recognized, Title VII is clearly applicable, just as it is with respect to any other civilian employee.

> When the instant case was appealed to the Federal Circuit, the intervenor [National Guard Bureau] brought to the attention of the court an uncodified provision of the National Guard Technicians Act that was not considered in *Gordon*:
>
> "Except as provided in this Act and in the amendments made by this Act, and notwithstanding any law, rule, regulation, or decision to the contrary, *the positions of persons employed under section 709 of title 32*, United States Code, existing on the day before the effective date of this Act, and the persons holding those positions on that day, *shall*, on and after that effective date, *be considered to be positions in and employees of the Department of the Army or the Department of the Air Force*, as the case may be, and employees of the United States *to the same extent as other positions in and employees of the Department of the Army or the Department of the Air Force*." Pub. L. No. 90-486, § 3(b), 82 Stat. 755, 757 (1968).
>
> Although the primary concerns prompting the enactment of the 1968 Act

> were the lack of a uniform and adequate retirement and fringe benefit program, and the question of the technicians' legal status under the Federal Tort Claims Act, *the language employed in section 3(b) establishes conclusively that technicians are not to be considered as Federal employees for these purposes only*. Despite the fact that they work for state organizations under the authority of a state official, *technicians must be considered as civilian employees of the Departments of the Army or Air Force who possess all the rights held by other Army and Air Force employees, save those rights specifically denied them in the National Guard Technicians Act*.

Kostan v. Arizona National Guard, 50 M.S.P.R. 182 (1991) (emphasis added). (Appendix, pp. A-65 through A-73) The Board's careful attention to the legislative history is commendable and appropriate in this context when attempting to derive the true legislative intent. *Moorehead v. United States*, 774 F.2d 936, 940 (9th Cir. 1985) ("When interpreting a statute, the court's objective is to ascertain the intent of Congress and to give effect to legislative will.").

The proposition that technicians are protected by Title VII has been accepted by at least one federal court and, as far as counsel can determine, rejected by no court that has considered this portion of the legislative history. *See Mackey v. Stetson*, 18 Empl. Prac. Dec. 8778 (CCH) (W.D.N.C. 1978) ("This action was brought under 42 U.S.C. § 2000e-16 against the Air National Guard, alleging discrimination in the operation of its Charlotte facility. The thrust of the complaint is that defendants' practices with respect to the hiring and promotion of technicians are racially discriminatory. The parties agree that technicians

are employees of the National Guard who must, by virtue of statute (32 U.S.C. § 709), also be commissioned in the National Guard. At the hearing and in their memoranda on the class certification issue, defendants have conceded that technicians are within the class of federal employees protected from race discrimination in employment under 42 U.S.C. § 2000e-16."). (Appendix, pp. A-62 through A-64)

The discussion in *Kostan* thoroughly considers the legislative history of section 709 to determine the true congressional intent with respect to the employment status of technicians. The discussion accurately recites the critical portion of P.L. 90-486 and applies a reasonable and plain interpretation of the language to conclude that National Guard technicians are civilian employees[13] for purposes of Title VII. (Appendix, pp. A-65) The Board's approach is further supported by congressional materials, which indicate that the purpose of the legislation was, in part, "[t]o clarify the technician's legal status which in certain areas has been the subject of conflicting court decisions, especially on the matter of whether technicians are covered under the Federal Tort Claims Act regarding third party actions against the U.S. Government." H.R. Rep. No. 1823, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Admin. News 3318, 3319. "The technicians, now numbering about 42,000, are full-time civilian employees of the National Guard whose salaries are paid in full by the Federal Government and who must meet all the mental and physical standards as well as professional qualifications prescribed by the military departments." *Id.* The history also reflects that membership in the National Guard is a *condition of* the technicians' *civil employment*, and nothing more. *Id.* The position of "technician" was clearly contemplated a "civil service position[]." *Id.* at 3324.

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[13]This conclusion is also clear from a reading of section 709(d) alone. 32 U.S.C. § 709(d).

Notwithstanding the sensible rationale for allowing Title VII protection for technicians, and the clear legislative history, as a study of Title VII cases in the lower courts demonstrates, without a pronouncement from this Court, the law will continue to be inconsistently applied. Potentially, hundreds of technicians will be left without the meaningful legal recourse to which they are entitled.

D. The Justiciability Doctrine Does Not Preclude a Legal Remedy in this Case.

This Court has never addressed the issue of whether a National Guard technician's Title VII action presents a justiciable controversy.[14] This important question of federal law potentially impacts thousands of people. Although most of the circuits have not addressed the issue in the Title VII context, the circuits have all addressed the justiciability of National Guard technicians' actions generally. The absence of a clear directive from this Court as to a single standard to be applied has created a morass of inconsistent and conflicting opinions. This void should be filled with a reasoned clarion call for uniformity and fairness.

The justiciability doctrine exists to prevent courts from overzealously regulating and interfering in areas traditionally considered to be military in nature. *See Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).[15] The general

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[14]In *Gilligan v. Morgan*, 413 U.S. 1 (1972), the Court did address claims presented by a National Guard technician, but the Court declined to decide the question of justiciability.

[15]*But see Knutson v. Wisconsin Air Nat'l Guard*, 995 F.2d 765, 769 (7th Cir. 1993), *cert. denied*, 62 U.S.L.W. 3288 (1993) ("Reading *Orloff* to support broad deference to the military ignores the narrow context in which the language is meant to apply. Deference to the military only

(continued...)

rationale for the doctrine is that military matters involve areas of expertise far outside the court's domain. *See Gilligan v. Morgan*, 413 U.S. 1, 10-11 (1973). The doctrine was not, however, conceived as a cloak to prevent courts from reviewing any and all military actions.

Generally, the Supreme Court has expressed an unequivocal willingness to intervene in those instances where there are judicially cognizable injuries. *Laird v. Tatum*, 408 U.S. 1 (1972).

> [W]hen presented with claims of judicially cognizable injury resulting from military intrusion into the civilian sector, federal courts are fully empowered to consider claims of those asserting such injury; there is nothing in our Nation's history or in the Court's decided cases, including our holding today, that can properly be seen as giving any indication that actual or threatened injury by reason of unlawful activities of the military would go unnoticed or unremedied.

Id. at 15-16. Further, in *Chappell v. Wallace*, the Court stated:

> This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service. (Citation omitted.)

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[13](...continued)
affected the Supreme Court's judgment as to the merits of Orloff's claim, not the question of whether it should have reviewed the claim at all.").

Chappell, 462 U.S. 296, 304 (1983). This general philosophy should be applied to Mier's case, although he is only viewed as "military" in a very limited context.

The Supreme Court previously has reviewed military personnel policies when constitutional infirmities were alleged. *See, e.g., Rostker v. Goldberg*, 453 U.S. 57 (1981); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973). Although these cases are distinguishable from Petitioner's case, they refute the notion that military or quasi-military decisions are absolutely beyond judicial inquiry.

Controversies between National Guard technicians and the National Guard should be treated differently than ordinary military disputes for the purpose of deciding justiciability. *See Laird v. Tatum*, 408 U.S. 1, 15-16 (1972) (Federal courts are fully empowered to consider claims of injury resulting from intrusion of the military sector into the civilian sector.); *Dunlap v. Tennessee*, 514 F.2d 130, 133 (6th Cir. 1975), *rev'd on other grounds*, 426 U.S. 312 (1975) ("Military" decisions made for non-military reasons, and involving no application of military expertise, may be outside the boundaries of the doctrine of unreviewability.); *Renicker v. Marsh*, 640 F. Supp. 244 (N.D. Ohio 1986) (similar holding). This Court has already stated that the conduct of the National Guard should not be immunized from all judicial scrutiny. *Gilligan v. Morgan*, 413 U.S. 110-11 (1973) ("It should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel.").

Distinguishing the National Guard from the military is further supported by the legislative history of 32 U.S.C.

§ 709 which indicates that Congress intended for technicians to have the same benefits and protections as other civilian employees of the government, with the exception of four limited statutory provisions, which are specifically identified in section 709. The doctrine of justiciability should not be used to circumvent or second-guess this legislative mandate.

1. The Supreme Court Has Not Addressed This Issue.

Historically, the Supreme Court has rendered a handful of opinions which have guided the circuits in determining the justiciability of military disputes; however, the courts have not been entirely successful in gleaning the Court's intention and they have not been uniform in their interpretation or application of the doctrine. *See United States v. Stanley*, 483 U.S. 669, 676 (1987).

In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), this Court authorized a suit for damages against federal officials whose actions violated an individual's constitutional rights, even though Congress had not expressly authorized such suits. The Court cautioned, however, that such a remedy will not be available when "special factors counselling hesitation" are present. *Id.* at 396. This rationale also formed the basis of this Court's decision in *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, this Court held that a soldier may not recover under the Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." *Id.* at 146. These two cases set the stage for *Chappell v. Wallace*, 462 U.S. 296 (1983).

In *Chappell*, the Supreme Court addressed the issue of whether enlisted military personnel can maintain suits to recover damages from superior officers for injuries sustained

as a result of violations of constitutional rights in the course of military service. This Court held that "the unique disciplinary structure of the Military Establishment and Congress' activity in the field constitute 'special factors' which dictate that it would be inappropriate to provide enlisted military personnel a Bivens-type remedy against their superior officers." *Id.* at 304. Although it is not controlling in our case since the Court was addressing claims of enlisted Navy personnel, not of a National Guard technician and the claims in *Chappell* were brought pursuant to 42 U.S.C. § 1985, not 42 U.S.C. § 2000e, *Chappell* has led to confusion on the justiciability issue.

The Supreme Court issued two subsequent decisions regarding the justiciability of military disputes. First, in *United States v. Shearer*, 473 U.S. 52 (1985), the Court granted *certiorari* to decide whether the survivor of a serviceman, who was murdered by another serviceman, could recover from the government under the Federal Tort Claims Act for negligently failing to prevent the murder. The Court followed *Feres* and determined that the claim involved the judiciary "in sensitive military affairs at the expense of military discipline and effectiveness." Therefore, it held that the claims must fail. Then, in *United States v. Stanley*, 483 U.S. 669 (1987), the Court accepted review to clarify the circumstances in which courts should decline to permit nonstatutory damages actions for injuries arising out of military service. In this case, the Court provided some guidance to the circuits and advocated using the "incident to service" test of *Feres* because it arguably "provides a line that is relatively clear and that can be discerned with less extensive inquiry into military matters." *Id.* at 683. The Court reaffirmed the "special factors" analysis of *Chappell* and ultimately concluded that no Bivens remedy is available for injuries that "arise out of or are in the course of activity incident to service." *Id.* at 684. Although these cases came closest to addressing the issues presented by Mier's case,

they are so factually distinct that they are of limited usefulness in this context.

As a National Guard technician, Mier is in a predominantly civilian position. Existing case law does not dictate that his claims be ignored as non-justiciable. First, almost all of the cases cited above address the claims of full-time enlisted military personnel. The courts' general rationale for deferring to the military and taking a laissez-faire approach is much less compelling in the context of a claim brought by a National Guard technician. The concerns over interfering in matters of military discipline and areas of military expertise do not apply when addressing the claims of a civilian technician working in a civilian capacity. Second, Mier is seeking relief under Title VII, 42 U.S.C. § 2000e, which was not the case in *Bivens*, *Feres*, *Chappell*, *Shearer*, or *Stanley*. This Court has never addressed the justiciability of a Title VII claim brought by a National Guard technician. Finally, Mier seeks monetary damages and equitable relief. While *Bivens* and its progeny dealt with claims for monetary relief, the justiciability of even a military member's claims for equitable relief has never been addressed by this Court.

2. The Circuit Courts Are Divided.

Not only does this case present a novel issue of significant federal importance, but it also provides the Court with an opportunity to resolve the present conflict in the circuits. The case law is replete with inconsistent and confusing doctrine regarding the standard to apply in determining the justiciability of military disputes.

Several years ago, nine of the eleven circuits employed the "*Mindes* test"[16] to determine what constituted

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[16] *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

a reviewable controversy.[17] *See Khalsa v. Weinberger*, 779 F.2d 1393, 1396 (9th Cir. 1985), *reaff'd*, 787 F.2d 1288, 1289 n.1 (9th Cir. 1985); *see also* Note, *Judicial Review of Constitutional Claims Against the Military*, 84 Colum.L.Rev. 387, 397, 402 (1984). Since then, the Supreme Court issued *Chappell* and the Court's intended "legal light" has been refracted by the circuits into a myriad of formulations for determining justiciability.

In *Wright v. Park*, 5 F.3d 586 (1st Cir. 1993), the First Circuit held that "*Mindes* has been banished from its homeland" and it adopted a new rule for determining justiciability. *Id.* at 591 n.6. Interpreting *Bivens*, *Chappell* and *Stanley*, the First Circuit concluded that civil rights claims in the military context, including the National Guard, against state officials under 42 U.S.C. § 1983, and under kindred statutes, will be deemed nonjusticiable controversies if the injuries arise out of or are in the course of activity incident to military service. *Id.* at 590-591. The court announced that it was joining several of its sister circuits in adopting this rule. *Id.* at 590 n.6, *citing Maddick v. United States*, 978 F.2d 614, 615 (10th Cir. 1992); *Kitowski v. United States*, 931 F.2d 1526, 1529 (11th Cir. 1991), *cert. denied*, 502 U.S. 938 (1991); *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004, 1006-1007 (8th Cir. 1989).

It does not appear that the Second Circuit has squarely addressed the issue. However, in *New York v. Federal Labor Rel. Auth.*, 696 F.2d 202 (2d Cir. 1982), the Court accepted for review, without addressing the justiciability issue, the New York National Guard's appeal of an order from the Federal Labor Relations Board, finding that the National Guard had engaged in unfair labor practices

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[17]The Federal Circuit and the Third Circuit elected not to adopt the *Mindes* test. *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1512 (D.C. Cir. 1989); *Dillard v. Brown*, 652 F.2d 316, 323 (3d Cir. 1981).

with regard to civilian technicians by requiring its civilian technicians to wear a military uniform while performing their daily duties as civilians. Also, in *Johnson v. State of New York*, 49 F.3d 75 (2d Cir. 1995), the Second Circuit accepted and reviewed a claim by a New York State National Guard technician under the Age Discrimination in Employment Act and found that the state had discriminated against plaintiff on the basis of his age. These cases illustrate the Second Circuit's willingness to review cases involving dress code and termination decisions, both of which have clear military overtones.

In *Jorden v. National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986), *cert. denied*, 484 U.S. 815 (1987), the Third Circuit considered the issue of whether National Guard officers were susceptible to suits by guardsmen for damages and injunctive relief under 42 U.S.C. § 1983. Relying on *Chappell*, the district court dismissed the action on a Rule 12(b) motion to dismiss. The appellate court found that while the district court was correct in dismissing the claim for damages, it was incorrect in dismissing the claim for injunctive relief or reinstatement.

The *Jorden* Court noted that the majority of courts to consider the question have held that *Chappell* establishes a *per se* prohibition of damages actions against military officers for violations of constitutional rights. *Id.* at 107 (*citing Trerice v. Summons*, 755 F.2d 1081 (4th Cir. 1985); *Martelon v. Temple*, 747 F.2d 1348 (10th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985); *Mollnow v. Carlton*, 716 F.2d 627 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)). However, the court acknowledged that other courts have disagreed in whole or in part. *Id. Shaw v. Gwatney*, 584 F. Supp. 1357, 1362 (E.D. Ark. 1984) (*Chappell* requires balancing strength of the right and likely degree of interference with the military order for determining whether suit is barred.). *C.f.*, *Brown v. United States*, 739 F.2d 362

(8th Cir. 1984), *cert. denied*, 473 U.S. 904 (1985) (*Chappell* automatically bars damages actions except in rare case in which alleged conduct is entirely unrelated to military mission.). Still other courts that have considered the question have held that *Chappell* leaves open claims for injunctive relief. *Id. See also Ogden v. United States*, 758 F.2d 1168 (7th Cir. 1985); *Gant v. Binder*, 766 F.2d 358 (8th Cir. 1985). Taking a divergent path, the *Jorden* Court ultimately concluded that as a general matter, requests for injunctive relief against the military *are reviewable*. *Jorden*, 799 F.2d at 109 (*citing Dillard v. Brown*, 652 F.2d 316 (3d Cir. 1981)).

The Fourth Circuit, in *Trerice v. Summons*, 755 F.2d 1081 (4th Cir. 1985), affirmed the dismissal of a Navy enlisted man's action for monetary damages under 42 U.S.C. §§ 1983(3) and 1986. The court relied on *Chappell*, but focused on an "intramilitary immunity" and refused to delve into military matters without an overwhelming justification. *Id.* at 1084. The Fourth Circuit also employed the *Mindes* test in *Guerra v. Scruggs*, 942 F.2d 270 (4th Cir. 1991), leaving open to interpretation when and how the Court determines justiciability.

The Fifth Circuit's opinion in *Crawford v. Texas Army Nat'l Guard*, 794 F.2d 1034 (5th Cir. 1986), largely guides its approach to determining justiciability of National Guard-related disputes. In *Crawford*, the court rejected the compensatory and equitable claims of twelve guardsmen. Interestingly, not only was the claim for monetary relief denied, following *Chappell* and *Shearer*, the court denied the claims for injunctive relief, or reinstatement, as well. *Id.*, at 1036-1037. This decision directly conflicts with the Third and Sixth Circuits.

The Sixth Circuit joined the Third Circuit in finding that a National Guard member may be entitled to injunctive

relief in a section 1983 action. *Schultz v. Wellman*, 717 F.2d 301 (6th Cir. 1983). In *Knutson v. Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir. 1993), the Seventh Circuit followed the Fifth Circuit in finding that a claim for injunctive relief under 42 U.S.C. § 1983 was nonjusticiable.

In *Watson v. Arkansas Nat'l Guard*, 886 F.2d 1004 (8th Cir. 1989), the Eighth Circuit rejected *Mindes* as the justiciability test and followed the Fifth Circuit's decision in *Crawford*. The court agreed that under 42 U.S.C. § 1983, neither claims for injunctive nor demands for monetary relief presented a justiciable controversy. However, the court agreed that facial challenges to the constitutionality of a military regulation or statute are justiciable, as are actions seeking judicial review of final agency action. *See Wood v. United States*, 968 F.2d 738, 739-40 (8th Cir. 1992).

In *Mier*, the Ninth Circuit held that Title VII does apply to National Guard technicians but that the actions of which Mier complained were "integrally related to the unique structure of the military" and therefore presented non-justiciable controversies. This test further illustrates the diversity of standards being used by the lower courts when addressing the justiciability issue.

The Tenth Circuit in *Martelon v. Temple*, 747 F.2d 1348 (10th Cir. 1984), agreed that claims for injunctive or monetary relief under 42 U.S.C. § 1983 were non-justiciable. Further, in *Oram v. United States*, 1994 U.S. App. LEXIS 30526, the court found that claims for injunctive and monetary damages under the Federal Tort Claims Act are not justiciable and used the "incident to service" rule originally announced in *Feres*.

In *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988), the Eleventh Circuit considered a Title VII claim of a National Guard

technician and, although it ultimately ruled in favor of the National Guard, the court *did consider* one of the claims and did not find it to be unreviewable. More recently, the Eleventh Circuit considered a naval reserve member's claims of due process and claims under the Rehabilitation Act and, although it did not address the district court's finding that Doe's due process claim was unreviewable, it stated that it found nothing objectionable in the district court's application of *Mindes*. *Doe v. Garrett*, 903 F.2d 1455, 1463 (11th Cir. 1990), *cert. denied*, 499 U.S. 904 (1991). Thus, it is unclear when and to what extent the Eleventh Circuit relies on *Mindes*. *Id.*, at 1463 n.15.

In *Kreis v. Secretary of the Air Force*, 866 F.2d 1508 (D.C. Cir. 1989), the Federal Circuit did not apply *Mindes* or any other test, but under general principles outlined in *Orloff*, *Gilligan* and *Chappell*, declined to review the merits of an Air Force Major's claim for retroactive promotion as nonjusticiable but found the Major's alternative claims for correction of military records to be justiciable.

In determining justiciability, the circuits have interpreted *Chappell* inconsistently and reached a number of divergent conclusions. Some courts have relied on immunity principles, while others have invoked the *Feres* "incident to service" test, the *Chappell* "special factors" test or even the Fifth Circuit's *Mindes* test to bolster their opinions. As it stands now, lower courts must apply their own jurisprudence to determine the justiciability of military claims, especially those seeking injunctive or other equitable relief. The inconsistency in the decisions reached has been compounded when the courts have considered claims of National Guard technicians, who are primarily civilian employees. Finally, *Chappell*'s relevance to a Title VII action is not clear. In sum, this case presents an issue of first impression and one of significant federal importance. The circuits' divergent

interpretations and applications of *Chappell* should further compel this Court to accept review.

E. The Ninth Circuit's Decision Should Be Affirmed in Part and Reversed in Part.

In its Memorandum Decision, a divided panel of the Ninth Circuit affirmed the judgment of the district court, albeit on different grounds. The court held that National Guard technicians hold hybrid positions entailing both civilian and military aspects, and that Title VII coverage of civilians employed by the military encompasses actions brought by National Guard technicians, except when the challenged conduct is "integrally related" to the military's unique structure. (Appendix, pp. A-3 through A-14) To the extent the Ninth Circuit found Title VII applicable, its opinion should be affirmed. The court concluded, however, that the specific acts about which Mier complained were integrally related to the military's structure and, therefore, not subject to judicial review and remedy. This aspect of the opinion should be reversed.

In addition, the Ninth Circuit construed the allegations of the complaint too narrowly. The standard of notice pleading is extremely liberal. *See, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). On appeal, the allegations in the complaint must be taken as true and reviewed in the light most favorable to the non-moving party. *Love v. United States*, 915 F.2d at 1245. The Court must draw all reasonable inferences in favor of the plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Dismissal is appropriate only when it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. A "court may dismiss a complaint only if it is clear that no relief could be granted

under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

In this case, the district court dismissed the complaint before the facts and evidence could be presented. Although Mier alleged certain discriminatory acts which had a military connection and had an impact on his civilian career, the claims are based, in part, on the fact that he was suspended from his civilian employment. Further, not all of Mier's damages have been caused by purely military actions. As Judge Reinhardt noted in his dissent:

> . . . indeed, he based certain of his claims upon discrimination against him as a *civilian* employee. Moreover, although his specific allegations suggest that two of his claims may rest, in part, upon military decisions, a plaintiff is not required to allege every factual basis for all of his claims at such an early stage in the proceedings. (Emphasis in original.)

(Appendix, p. A-14)

The Supreme Court in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), held that when ruling on Rule 12(b) motions to dismiss a judge "must presume[ ] that general allegations *embrace the specific facts* that are necessary to support the claim." *Id.* (emphasis added). Contrary to well-established law, in this case, the Ninth Circuit did not view the discrimination or retaliation claims in a light most favorable to Mier. The court read the general allegations too narrowly and improperly affirmed the district court's decision.

The Memorandum Decision sets forth new parameters for the application of Title VII to uniformed members of the National Guard. The Panel clarifies the protection of civil rights laws for National Guard technicians.[18] However, its decision is inconsistent with other opinions. *See, e.g., Taylor v. Jones*, 653 F.2d 1193 (8th Cir. 1981); *Stinson v. Hornsby*, 821 F.2d 1537 (11th Cir. 1987), *cert. denied*, 488 U.S. 959 (1988); *Becker v. Rice*, 827 F. Supp. 589 (W.D. Ark. 1993).

The Ninth Circuit itself arguably has issued a number of contrary and even conflicting opinions on this topic. Generally, the Ninth Circuit has not applied Title VII to uniformed members of the National Guard. *See Frey v. California*, 982 F.2d 399 (9th Cir. 1993), *cert. denied*, 61 U.S.L.W. 3852 (1993); *Helm v. State of California*, 722 F.2d 507 (9th Cir. 1983); *Gonzalez v. Department of the Army*, 718 F.2d 926 (9th Cir. 1983); *Sebra v. Neville*, 801 F.2d 1135 (9th Cir. 1986); *Christoffersen v. Washington State Air Nat'l Guard*, 855 F.2d 1437 (9th Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989). However, the Ninth Circuit has, on occasion, entertained Title VII actions of military personnel and upheld their claims. *See, e.g., Bledsoe v. Webb*, 839 F.2d 1357 (9th Cir. 1988); *Lutz v. Secretary of the Air Force*, 944 F.2d 1477 (9th Cir. 1991). These apparent conflicts within the circuit provide additional support for granting this Petition for Certiorari.

CONCLUSION

The Supreme Court should review the Ninth Circuit's opinion because Title VII, 42 U.S.C. § 2000e, is an

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[18]Mier contends that the Ninth Circuit's test is too limited and is subject to easy manipulation by the perpetrators who will always be able to find a military reason for the actions taken due to the hybrid nature of a National Guard technician's position.

important and widely used federal statute that has broad implications for individuals across the country. The decision below expands the application of Title VII to uniformed members of the National Guard, and further confuses the law in this area. Due to the number of individuals potentially affected by the Court's ruling and its uncontested "national" application, the Court should review the Ninth Circuit's decision.

This Court should resolve the conflict that currently exists among the circuits and even within the Ninth Circuit with respect to the applicability of Title VII and justiciability by providing the guidance necessary to ensure consistent application of federal law. Civil rights protection should be available to National Guard technicians, whose jobs are predominantly civil in nature. And, actions speciously cloaked in military garb should not be allowed to defeat fundamental rights. Such was not the intent of Congress and it should not be the effect of this Court's decision.

For these reasons, Petitioner respectfully urges this Court to grant his Petition.

RESPECTFULLY SUBMITTED this 21ST day of November, 1995.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR J. MIER,

Plaintiff-Appellant,

v.

DONALD L. OWENS, in his official capacity as Adjutant of the Arizona State Army National Guard, and MICHAEL P.W. STONE, in his official capacity as Secretary of the Army,

Defendants-Appellees.

No. 93-15923

D.C. No. CIV-92-07450-PHX-PGR

ORDER

Before: TANG*, REINHARDT, and RYMER, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote

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* Because of the death of Judge Tang, the petition and suggestion were considered and acted upon by the two other members of the panel only.

on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARTHUR J. MIER,

Plaintiff-Appellant,

v.

DONALD L. OWENS, in his official capacity as Adjutant of the Arizona State Army National Guard; and MICHAEL P.W. STONE, in his official capacity as Secretary of the Army,

Defendants-Appellees.

No. 93-15923

D.C. No. CV-92-00745-PGR

OPINION

Appeal from the United States District Court
for the District of Arizona
Paul G. Rosenblatt, District Judge, Presiding

Argued and Submitted
December 14, 1994-San Francisco, California

Filed June 9, 1995

Before: Thomas Tang, Stephen Reinhardt, and Pamela Ann Rymer, Circuit Judges.

Opinion by Judge Tang; Partial Concurrence and Partial Dissent by Judge Reinhardt; Concurrence by Judge Rymer

SUMMARY

Government Law/Military Law/ Employment Discrimination

The court of appeals affirmed a district court judgment. The court held that a National Guard technician whose job is a hybrid military-civilian position cannot maintain a Title VII employment discrimination action with respect to personnel actions integrally related to the military's unique structure.

Appellant Arthur Mier is a Hispanic civil service technician employed in the Arizona Army National Guard. His job is a hybrid position, combining military and civilian aspects. He serves in a civilian capacity as a full time supply management officer and in a military capacity as a commissioned officer not on active duty. His civilian position requires that he be a member of the National Guard and hold the commensurate military position.

Mier filed a Title VII complaint against appellees Donald Owens, adjutant of the Arizona Army National Guard and Michael Stone, Secretary of the Army, alleging they discriminated against him on account of race, color, and national origin. In particular, Mier alleged he was denied military promotions and was suspended from civilian employment as a result of the denial of the requisite military promotions. He also alleged the defendants engaged in retaliatory actions.

The district court dismissed the complaint, holding it had no jurisdiction over Mier's claims because Title VII is

not applicable to uniformed members of the armed forces. The court also found that Mier's claims were nonjusticiable.

[1] The National Guard Technicians Act (NGTA) nowhere expressly states that Title VII applies to National Guard technicians. [2] NGTA employment rules for Guard technicians neither indicate that Title VII is applicable nor preclude Title VII coverage. They merely indicate that the Guard technician job is dual-status.

[3] The military has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns. [4] Courts regularly decline to hear lawsuits involving personnel actions integrally related to the military's unique structure. [5] However, personnel actions are not always integrally related to the military's unique structure. [6] Because Guard technicians are in a hybrid job entailing both civilian and military aspects, Title VII coverage of civilians employed by the military encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure.

[7] Title VII does not permit judicial review of decisions regarding the military promotion of individuals serving as Guard technicians. Because suspension of Mier's civilian promotion resulted from denial of the military promotion, the suspension likewise could not be reviewed. [8] The retaliation claim cannot stand because the retaliatory acts were all integrally related to the military's structure.

Judge Reinhardt concurred and dissented. He agreed with the majority's conclusion that federal courts may entertain Title VII claims of dual-status National Guard technicians except when they are so integrally related to the military aspect of their job as to render them nonjusticiable. However, he believed that Mier's complaint could fairly be

read to allege a Title VII complaint arising from his civilian employment and therefore concluded that the district court erred in dismissing the complaint.

Judge Rymer concurred, writing that the only issue to be decided was whether a Guard technician's challenge to personnel actions integrally related to the military's unique structure is cognizable under Title VII.

COUNSEL

Daniel D. Maynard, Johnston, Maynard Grant & Parker, Phoenix, Arizona, for the plaintiff-appellant.

Cynthia M. Parsons, Assistant United States Attorney, Phoenix, Arizona, for the defendants-appellees.

OPINION

TANG, Senior Circuit Judge:

Arthur J. Mier appeals from a district court judgment dismissing his Title VII cause of action for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted. The issue on appeal is whether a National Guard technician, whose job is a hybrid military-civilian position, can maintain a Title VII employment discrimination action. We conclude that Title VII applies to Guard technicians except when they challenge personnel actions integrally related to the military's unique structure. Because all of Mier's claims challenge actions of this kind, his complaint does not state a claim upon which relief can be granted. Therefore, we affirm the judgment of the district court, albeit on different grounds than provided by the district court.

Arthur J. Mier is a Hispanic civil service technician employed in the Arizona Army National Guard. Mier's job is a hybrid position, combining both military and civilian aspects. Mier serves in a civilian capacity as a full time supply management officer and in a military capacity as a commissioned officer not on active duty. In order to hold the civilian position, Mier is required to be a member of the National Guard and hold the commensurate military position.

Mier filed a complaint alleging defendants Donald Owens, adjutant of the Arizona Army National Guard, and Michael Stone, Secretary of the Army, discriminated against him on account of race, color, and national origin in violation of Title VII. The complaint alleges that the defendants discriminatorily denied Mier military promotions and suspended him from civilian employment as a result of the denial of the requisite military promotions. He also claims the defendants failed to promote him, suspended him and investigated him all in retaliation for filing a discrimination complaint with the Department of the Army in 1986.

The district court dismissed the action, holding that it had no jurisdiction over Mier's claims because Title VII is not applicable to uniformed members of the armed forces. The district court also held that Mier had failed to state a claim upon which relief could be granted because his claims were non-justiciable. Mier appeals the district court judgment.

The protection against employment discrimination provided by Title VII applies to civilian employees of the military, through 42 U.S.C. § 2000e-16(a). *Gonzalez v. Dept. of Army*, 718 F.2d 926, 928 (9th Cir. 1983). Title VII does not protect military personnel. *Id.* The issue on appeal is whether a National Guard technician, whose job is a hybrid military-civilian job, can maintain a Title VII employment discrimination action. Mier argues that Title

VII applies to all personnel actions affecting National Guard technicians. The National Guard argues that the personnel actions at issue in this case, promotion, suspension, and an investigation, are miliary actions to which Title VII does not apply.

We begin by considering the National Guard Technicians Act ("NGTA"), 32 U.S.C. § 709, to determine whether Congress stated in "unmistakable terms" that Title VII applies to National Guard technicians. *See Gonzalez*, 718 F.2d at 928 (quoting *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir. 1978) (reasoning that, had Congress meant Title VII to apply to uniformed personnel, "it would have said so in unmistakable terms").

[1] The NGTA nowhere expressly states that Title VII applies to Guard technicians. Although the statute provides that a Guard technician is "an employee of the Department of the Army or the Department of the Air Force, as the case may require," § 709(d), this language indicates nothing about Title VII coverage. Title VII contains similar language, providing coverage to "employees . . . in military departments," but this language has been interpreted to apply only to civilian employees of the military, not to uniformed military personnel. *Gonzalez*, 718 F.2d at 927-28.

[2] The NGTA also sets forth employment rules of Guard technicians including the following: 1) If a Guard technician's job requires Guard membership, severance from the Guard requires severance from the technician's job; and 2) a technician who fails to meet military security standards can be severed from both the Guard and the technician job. 32 U.S.C. § 709(e)(1)-(2). These rules neither indicate that Title VII is applicable, nor preclude Title VII coverage. These rules merely indicate that the Guard technician job is dual-status. The NGTA also lists several employment statutes that do not apply to Guard technicians and Title VII

is not included among them. While the absence of Title VII from a list of inapplicable statutes may be the strongest suggestion in the NGTA that Congress intended Title VII to apply to Guard technicians, applicability of Title VII is clearly not provided in "unmistakable terms."

Although *Gonzalez* concluded that Congress would not apply Title VII to uniformed military personnel except in unmistakable terms, Guard technicians, who serve in a dual capacity as both military and civilian employees, are in a different position than purely military personnel. We proceed to consider the circumstances in which Title VII coverage applies to such dual-status employees.

[3] Courts have declined to review a variety of employment actions involving military personnel because, in the military, "overriding demands of discipline and duty" prevail, demands which do not have a counterpart in civilian life. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983) (internal quotation omitted). "The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection." *Id.* Therefore, the military has developed "a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns." *Id.*

[4] Courts regularly decline to hear lawsuits involving personnel actions integrally related to the military's unique structure. Military personnel cannot sue superior officers to recover damages for alleged constitutional violations because the "relationship between enlisted military personnel and their superior officers . . . is at the heart of the necessarily unique structure of the Military Establishment." *Id.* at 300, 305. A Guard technician's challenge to a military transfer is nonjusticiable in part because "transfer decisions go to the

core of deployment of troops and overall strategies of preparedness." *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986). Guard technicians' challenges to discharge by the Guard and termination from technician employment are nonjusticiable because judicial review "would seriously impede the military in performance of its vital duties." *Christoffersen v. Washington State Air National Guard*, 855 F.2d 1437, 1444 (9th Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989).

[5] However, personnel actions are not always integrally related to the military's unique structure. A Title VII claim challenging the refusal to allow a female civilian employee to embark on a Naval aircraft carrier is not so "inherently military" as to be nonjusticiable. *Bledsoe v. Webb*, 839 F.2d 1357, 1360 (9th Cir. 1988). The employee in *Bledsoe* was an electronics technician whose duties included "providing technical assistance for operation and maintenance of navigational and electrical systems on E2 aircraft" located on Navy vessels. *Id.* at 1358. She was denied embarkation on the ground that berthing was not available on the ship. The Ninth Circuit concluded that Bledsoe's Title VII claim was not nonjusticiable because she was a civilian employee and the challenged conduct did not implicate an unmistakably military policy. *Id.* at 1360. The court distinguished the challenged conduct from other conduct considered "inherently military," such as enlistment procedures and termination of enlisted personnel. *Id.*

Similarly, intra-military immunity did not apply to claims brought by a former major in the United States Air Force because the challenged conduct neither arose out of nor was incident to military service. *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1486 (9th Cir. 1991). The former major sued the Air Force and three sergeants who broke into her office after hours, opened her private mail, and disseminated it in an attempt to ruin her reputation. *Id.*

at 1478. In concluding the conduct was not incident to military service, the Ninth Circuit distinguished *Stauber v. Cline*, 837 F.2d 395 (9th Cir.), *cert. denied*, 488 U.S. 817 (1988), a Guard technician case in which intra-military immunity applied, in part because the *Stauber* defendants were all superior in rank to the plaintiff and one was his direct supervisor. *Lutz*, 944 F.2d at 1486.

[6] *Bledsoe* and *Lutz* establish that, in some circumstances, personnel actions are not integrally related to the military's structure. Concerns regarding military hierarchy and discipline may not be at issue in suits alleging discriminatory conduct on the part of peers or subordinates. In addition, actions affecting civilian employees may not involve matters considered military in nature. Because Guard technicians are in a hybrid job entailing both civilian and military aspects, we conclude that Title VII coverage of civilians employed by the military encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure.

We now review Mier's complaint to determine whether the discriminatory personnel actions l ·ts forth are integrally related to the military's unique structure. Because this cause is before us on appeal of a judgment granting a motion to dismiss, we "presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). We do not affirm the judgment granting the motion to dismiss "unless it appears beyond doubt that [Mier] can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotation omitted).

Mier first alleges that the defendants "systematically and continuously discriminated against [him], with respect to promotions solely based on race, color and national origin."

He also claims suspension from his civilian job resulted, in part, from "discriminatory practices that occurred in relation to the military promotion process." Mier adds:

> Specifically, . . . within the procedure for promotions, a high degree of subjectivity exists regarding the final selection as to who is chosen from those recommended as qualified. The final authority to make such decisions is based on highly-subjective criteria and such authority has systematically been placed in the hands of those with discriminatory motive and intent. These individuals have failed to promote [Mier] and to suspend him from his employment.

At a later point, Mier again mentions that the defendants "failed to promote [him] to the rank of Major."

[7] Military promotion is one of the most obvious examples of a personnel action that is integrally related to the military's structure. Decisions regarding who is promoted and why are central to maintenance of the military's hierarchy. Title VII does not allow this court to review decisions regarding the military promotion of individuals serving as Guard technicians. Because suspension from civilian promotion resulted from denial of the military promotion, the suspension likewise cannot be reviewed.

Mier next alleges that the defendants retaliated against him for filing a discrimination complaint with the Army. He claims the defendants have subjected him to "ongoing retaliatory actions and reprisals" and that the defendants "[s]pecifically . . . have failed to promote [Mier] to the rank of Major and have subjected him to investigations in retaliation for filing his Complaint and have currently suspended [Mier] from his civilian employment."

[8] The retaliation claim cannot stand because the retaliatory acts are all integrally related to the military's structure. We have already explained why neither military promotion nor suspension from civilian employment tied to military promotion can be addressed. Investigation is an act central to the military's unique concerns regarding discipline and control.

The discriminatory actions set forth in the complaint are personnel actions integrally related to the military's structure. Title VII does not encompass such claims.

The judgment of the district court is AFFIRMED.

REINHARDT, J., concurring and dissenting.

I agree with the majority that federal courts may entertain the Title VII claims of dual-status national Guard technicians claims except when they are so integrally related to the military aspect of their job as to render them nonjusticiable. I expressly concur in the holding that "Title VII coverage of civilians employed by the military encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure." I disagree only with the opinion's conclusion that Mier has failed to state a claim on which relief may be granted under the standard set forth in the opinion: I believe that Mier's complaint can fairly be read to allege a Title VII complaint arising from his civilian employment.

In light of the generous standards of notice pleading, *see, e.g., Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989); *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1982). I believe that the majority reads the complaint too

narrowly. Mier's general allegations do not indicate that his claims are purely military in nature; indeed, he based certain of his claims upon discrimination against him as a *civilian* employee. Moreover, although his specific allegations suggest that two of his claims may rest, in part, upon military decisions, a plaintiff is not required to allege every factual basis for all of his claims at such an early stage in the proceedings. *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177, 3189 (1990) (holding that, when ruling on Rule 12(b) motions to dismiss, a judge must "presume[] that general allegations *embrace the specific facts* that are necessary to support the claim." (emphasis added)). If Mier's case is truly as deficient as the majority presumes, that fact will become readily apparent when a summary judgment motion is made. I would therefore hold that the district court erred in dismissing the complaint under Rule 12(b)(6).

RYMER, Circuit Judge, concurring.

I concur in Judge Tang's opinion except for his statement of the holding, that

> Title VII coverage of civilians employed by the military encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure.

The only issue before us, and all that we rightfully decide, is whether a Guard technician's challenge to personnel actions integrally related to the military's unique structure is cognizable under Title VII. For the reasons his opinion sets out, I agree that such a challenge fails.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ARTHUR J. MIER,

Plaintiff,

vs.

DONALD L. OWENS, et al.,

Defendants.

No. CIV 92-0745 PHX PGR

ORDER

The plaintiff, an Hispanic dual status employee of the Arizona National Guard, brought this action for damages and injunctive relief pursuant to 28 U.S.C. § 1331 on the grounds that the defendants' actions in denying him a promotion to the military rank of major, subjecting him to unwarranted military investigations, and suspending him from his civilian position constituted discriminatory and retaliatory acts in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* Having considered the memoranda filed in support of and in opposition to the defendants' motion to dismiss this action, the Court finds that this action should be dismissed in its entirety.

The Court concurs with the defendants that it has no jurisdiction over the plaintiff's claims of denial of promotion and unwarranted investigations because Title VII, the basis on which the plaintiff alleges federal question jurisdiction, although applicable of civilian employees of the armed

forces, is not applicable to uniformed members of the armed forces. *Gonzalez v. Department of Army*, 718 F.2d 926, 928-29 (9th Cir. 1983). The fact that the plaintiff's status as a National Guard technician gives his employment a hybrid character, in that he is simultaneously employed as a civilian supply officer and as a military company commander, does not warrant a conclusion that he should be treated a civilian for purposes of Title VII's protection even if, as he contends, his role as a civilian employee of the Arizona National Guard predominates over his role as a military officer in the National Guard. Courts have recognized that the legislative history of the National Guard Technicians Act, 32 U.S.C. § 709, evidences a Congressional intent that the military aspect predominate. *Martelon v. Temple*, 747 F.2d 1348, 1351-52 (10th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985) ("The legislative history of the Act shows that Congress considered that the military mission of the technicians was paramount and that the technician's duties were inseparable from his or her military obligations."); *c.f.*, *New Jersey Air National Guard v. F.L.R.A.*, 677 F.2d 276, 279 (3rd Cir.), *cert. denied*, 459 U.S. 988 (1982) (The responsibilities and duties of National Guard technicians arise in a distinctly military context and implicate significant military concerns.); *see also*, 32 U.S.C. § 709(b) and (e)(1).

The Court further finds that none of the claims raised by the plaintiff state a claim upon which relief could be granted due to the prudential doctrine of justiciability. The plaintiff's challenges to his lack of promotion and his suspension as a civilian technician involve contested internal military matters whose reviewability is determined by the *Mindes* test as adopted by the Ninth Circuit. *Sebra v. Neville*, 801 F.2d 1135, 1141 (9th Cir. 1986) (Justiciability of disputes between National Guard technicians and the National Guard are reviewed under *Mindes* test.); *NeSmith v. Fulton*, 615 F.2d 196, 201 (5th Cir. 1980) (Justiciability of a dual status National Guard technician's challenge to the

decision to terminate him as a civilian technician reviewed under *Mindes* test). Even if the plaintiff is deemed to have met the two prerequisites of the first prong of the *Mindes* test, and he has not with regard to his suspension claim since he had not exhausted available intraservice remedies at the time he commenced this action, the Court concludes that the four factors of the second prong of the *Mindes* test, particularly the latter three, militate against judicial review. *Gonzalez v. Dept. of Army*, 718 F.2d at 929-30 (Judicial review of military officer's claim of lack of promotion due to race discrimination denied because the claim failed to meet the last three factors of the *Mindes* test); *NeSmith v. Fulton*, 615 F.2d at 201-02 (Judicial review of dual status National Guard technician's challenge to his dismissal from his civilian technician job denied pursuant to the second prong of the *Mindes* test.); *c.f.*, *Kries v. Secretary of Air Force*, 866 F.2d 1508, 1511 (D.C.Cir. 1989) (Air Force officer's suit seeking a judicially ordered retroactive promotion dismissed because it fell "squarely within the realm of nonjusticiable military personnel decisions.") Therefore,

IT IS ORDERED that the Defendants' Motion to Dismiss (doc. #8) is granted and that this action is dismissed in its entirety. The Clerk of the Court shall enter judgment accordingly.

Dated this 12th day of April, 1993.

S/

Paul G. Rosenblatt
United States District Judge

§ 102. Military departments

The military departments are:

The Department of the Army.

The Department of the Navy.

The Department of the Air Force.

5 U.S.C. § 7511. Definitions; application

* * *

(b) This subchapter does not apply to an employee--

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by --

(A) the President for a position that the President has excepted from the competitive service;

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;

(5) who is described in section 8337(h)(1), relating to technicians in the National Guard;

* * *

32 U.S.C. § 101 ORGANIZATION

§ 101. Definitions

In addition to the definitions in sections 1-5 of title 1, the following definitions apply in this title:

(1) "Territory" means any Territory organized after this title is enacted, so long as it remains a Territory. However, for purposes of this title and other laws relating to the militia, the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States, "Territory" includes Guam and the Virgin Islands.

(2) "Armed forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(3) "National Guard" means the Army National Guard and the Air National Guard.

(4) "Army National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive, that--

(A) is a land force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(5) "Army National Guard of the United States" means the reserve component of the Army all

of whose members are members of the Army National Guard.

(6) "Air National Guard" means that part of the organized militia of the several States and Territories, Puerto Rico, and the District of Columbia, active and inactive that--

(A) is an air force;

(B) is trained, and has its officers appointed, under the sixteenth clause of section 8, article I, of the Constitution;

(C) is organized, armed, and equipped wholly or partly at Federal expense; and

(D) is federally recognized.

(7) "Air National Guard of the United States" means the reserve component of the Air Force all of whose members are members of the Air National Guard.

(8) "Officer" means commissioned or warrant officer.

(9) "Enlisted member" means a person enlisted in, or inducted, called, or conscripted into, an armed force in an enlisted grade.

(10) "Grade" means a step or degrees, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation.

(11) "Rank" means the order of precedence among members of the armed forces.

(12) "Active duty" means full-time duty in the active military service of the United States. It includes such Federal duty as full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. It does not include full-time National Guard duty.

(13) "Supplies" includes material, equipment, and stores of all kinds.

(14) "Shall" is used in an imperative sense.

(15) "May" is used in a permissive sense. The words "no person may. . ." mean that no person is required, authorized, or permitted to do the act prescribed.

(16) "Includes" means "includes but is not limited to".

(17) "Pay" includes basic pay, special pay, incentive pay, retired pay, and equivalent pay, but does not include allowances.

(18) "Spouse" means husband or wife, as the case may be. Aug. 10, 1956, c. 1041, 70A Stat. 596; Sept. 2, 1958, Pub.L. 85-861, § 2(1), 72 Stat. 1542.

(19) "Full-time National Guard duty" means training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of

Columbia under section 316, 502, 503, 504, or 505 of this title for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

32 U.S.C. § 709 Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in--

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

(c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section.

(d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned--

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician

and such notification shall be given at least thirty days prior to the termination date of such employment.

(f) Sections 2108, 3502, 7511, and 7512 of title 5, do not apply to any person employed under this section.

(g)(1) Notwithstanding sections 5544(a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may, in the case of technicians assigned to perform operational duties at air defense sites--

(A) prescribe the hours of duties;
(B) fix the rates of basic compensation; and
(C) fix the rates of additional compensation;

to reflect unusual tours of duty, irregular additional duty, and work on days that are ordinarily nonworkdays. Additional compensation under this subsection may be fixed on an annual basis and is determined as an appropriate percentage, not in excess of 12 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 of the General Schedule under section 5332 of title 5.

(2) Notwithstanding sections 5544 (a) and 6101(a) of title 5 or any other provision of law, the Secretary concerned may, for technicians other than those described in clause (1) of this subsection, prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5 or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time

spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(h) In no event shall the number of technicians employed under this section at any one time exceed 53,100.

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter --

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so

engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) twenty-five or more during the first year after March 24, 1972, or (B) fifteen or more thereafter, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or

the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, and further includes any governmental industry, business, or activity.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

(k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

(l) The term "complaining party" means the Commission, the Attorney General, or a person who may bring an action or proceeding under this subchapter.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e-16 of this title.

42 U.S.C. § 2000e CIVIL RIGHTS

§ 2000e-3. Other unlawful employment practices

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference,

limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

§ 2000e-5. Enforcement provisions

Power of Commission to prevent unlawful employment practices

(a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

Charges by persons aggrieved or member of Commission of unlawful employment practices by employers, etc.; filing; allegations; notice to respondent; contents of notice; investigation by Commission; contents of charges; prohibition on disclosure of charge; determination of reasonable cause; conference, conciliation, and persuasion for elimination of unlawful practices; prohibition on disclosure of informal endeavors to end unlawful practices; use of evidence in subsequent proceedings; penalties for disclosure of information; time for determination of reasonable cause

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an

investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a

investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which the Commission is authorized to take action with respect to the charge.

State or local enforcement proceedings; notification of State or local authority; time for filing charges with Commission; commencement of proceedings

(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a

State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a State or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate state or local authority.

State or local enforcement proceedings; notification of State or local authority; time for action on charges by Commission

(d) In the case of any charge filed by a member of the Commission alleging an unlawful employment practice occurring in a State or political subdivision of a State which has a State or local law prohibiting the practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, the Commission shall, before taking any action with respect to such charge, notify the appropriate State or local officials and, upon request, afford them a reasonable time, but not less than sixty days (provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective day of such State or

local law), unless a shorter period is requested, to act under such State or local law to remedy the practice alleged.

(e) Time for filing of charges; notice; time unlawful practice with respect to seniority system occurs

(1) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the state or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

(2) For purposes of this section, an unlawful employment practice occurs, with respect to a seniority system that has been adopted for an intentionally discriminatory purpose in violation of this subchapter (whether or not that discriminatory purpose is apparent on the face of the seniority provision), when the seniority system is adopted, when an individual becomes subject to the seniority system, or when a person aggrieved is injured by the application of the seniority system or provision of the system.

Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. if a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision,

or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over

proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue

has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

(g) Relief available

(1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring; reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

(B) On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court --

(i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title; and

(ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).

Provisions of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

Proceedings by Commission to compel compliance with judicial orders

(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under this section, the Commission may commence proceedings to compel compliance with such order.

Appeals

(j) Any civil action brought under this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

(k) Attorney's fees; liability of Commission and United States for costs

In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-16. Employment by Federal Government

Discriminatory practices prohibited; employees or applicants for employment subject to coverage

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Enforcement powers of Commission; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

(b) Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall

issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall --

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to --

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the qual employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) **Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant**

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in

which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties.

Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

P.L. § 90-486

AN ACT

To clarify the status of National Guard technicians, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "National Guard Technicians Act of 1968".

SEC. 2. Title 32, United States Code, is amended as follows:

(1) Section 709 is amended to read as follows:

"§ 709. Technicians: employment, use, status

"(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in--

"(1) the administration and training of the National Guard; and

"(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

"(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

"(c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section.

"(d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.

"(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned--

"(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

"(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

"(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

"(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

"(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

"(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

"(f) Sections 2108, 3502, 7511, and 7512 of title 5, United States Code, do not apply to any person employed under this section.

"(g)(1) Notwithstanding sections 5544(a) and 6102 of title 5, United States Code, or any other provision of law, the Secretary concerned may, in the case of technicians assigned to perform operational duties at air defense sites --

"(A) prescribe the hours of duties;
"(B) fix the rates of basic compensation; and
"(C) fix the rates of additional compensation;

to reflect unusual tours of duty, irregular additional duty, and work on days that are ordinarily nonworkdays. Additional compensation under this subsection may be fixed on an annual basis and is determined as an appropriate percentage, not in excess of 12 percent, of such part of the

rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 of the General Schedule under section 5332 of title 5, United States Code.

"(2) Notwithstanding sections 5544(a) and 6102 of title 5, United States Code, or any other provision of law, the Secretary concerned may, for technicians other than those described in clause (1) of this subsection, prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5, United States Code, or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

"(h) In no event shall the number of technicians employed under this section at any one time exceed 42,500."

(2) The analysis of chapter 7 is amended by striking out the following item:

"709. Caretakers and clerks."

and inserting in place thereof the following item:

"709. Technicians: employment, use, status."

(3) Section 715(a) is amended by striking out "caused by a person employed under section 709 of this title acting within the scope of his employment;".

SEC. 3. (a) A claim accrued under section 715 of title 32, United States Code, before the effective date of this Act by reason of the act or omission of a person employed under section 709 of title 32, United States Code, may, if otherwise allowable, be settled and paid under section 715 of title 32, United States Code.

(b) Except as provided in this Act and in the amendments made by this Act, and notwithstanding any law, rule, regulation, or decision to the contrary, the positions of persons employed under section 709 of title 32, United States Code, existing on the day before the effective date of this Act, and the persons holding those positions on that day, shall, on and after that effective date, be considered to be positions in and employees of the Department of the Army or the Department of the Air Force, as the case may be, and employees of the United States to the same extent as other positions in and employees of the Department of the Army or the Department of the Air Force. Such positions shall be outside the competitive service, if, as a condition of employment, the persons employed therein were, on the day before the effective date of this Act, required to be members of the Army National Guard or the Air National Guard.

(c) All service under section 709 of title 32, United States Code, or prior corresponding provision of law, performed before the effective date of this Act shall be included and credited in the determination of length of service for the purposes of leave, Federal employees death and disability compensation, group life and health insurance, severance pay, tenure, and status. This subsection shall apply only in the case of persons who perform service under section 709 of title 32, United States Code, on or after the effective date of this Act.

(d) Annual leave and sick leave to which a technician was entitled on the day before the conversion of his position, as provided in subsection (b) of this section, shall be credited to him in his new position.

SEC. 4. Section 2105(a) of title 5, United States Code, is amended --

(1) by striking out "or" at the end of clause (1)(D);

(2) by adding "or" at the end of clause (1)(E); and

(3) by adding the following new subclause (F) at the end of clause (1):

"(F) the adjutants general designated by the Secretary concerned under section 709(c) of title 32, United States Code;".

SEC. 5. (a) Section 8332(b) of title 5, United States Code, is amended --

(1) by striking out "and" at the end of clause (4);

(2) by striking out the period at the end of clause (5) and inserting in place thereof ";and"; and

(3) by adding the following new clause:

"(6) employment under section 709 of title 32, United States Code or any prior corresponding provision of law."; and

(4) by adding at the end thereof the following:

"Service referred to in paragraph (6) is allowable only in the case of persons performing service under section 709 of title 32, United States Code, on or after the effective date of the National Guard Technicians Act of 1968."

(b) Section 8334(c) of title 5, United States Code, is amended by adding at the end thereof the following: "Notwithstanding the foregoing provisions of this subsection, the deposit with respect to a period of service referred to in section 8332(b)(6) which was performed prior to the effective date of the National Guard Technicians Act of 1968

shall be an amount equal to 55 per centum of a deposit computed in accordance with such provisions."

(c) Section 8339 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(l) In determining service for the purpose of computing an annuity under each paragraph of this section, 45 per centum of each year, or fraction thereof, of service referred to in section 8332(b)(6) which was performed prior to the effective date of the National Guard Technicians Act of 1968 shall be disregarded."

(d) Clause (4) of subsection (a) of this section and subsections (b) and (c) of this section do not apply to any person employed prior to the effective date of this Act under section 709 of title 32, United States Code, whose employment under that section was covered by subchapter III of chapter 83 of title 5, United States Code.

SEC. 6. (a) Notwithstanding section 709(d) of title 32, United States Code, a person who, on the date of enactment of this Act, is employed under section 709 of title 32, United States Code, and is covered by an employee retirement system of, or plan sponsored by, a State or the Commonwealth of Puerto Rico, may elect, not later than the effective date of this Act, not to be covered by subchapter III of chapter 83 of title 5, Untied States Code, and with the consent of the State concerned or Commonwealth of Puerto Rico, to remain covered by the employee retirement system of, or plan sponsored by, that State or the Commonwealth of Puerto Rico. Unless such an election, together with a statement of approval by the State concerned or the Commonwealth of Puerto Rico, is filed with the Secretary of the Army of the Secretary of the Air Force, as appropriate, on or before the effective date of this act, the person

concerned is covered by subchapter III of chapter 83 of title 5, United States Code, as of that date.

(b) A member of the National Guard of a State or the Commonwealth of Puerto Rico who was employed as a technician under section 709 of title 32, United States Code, or prior corresponding provision of law, who --

(1) was involuntarily ordered to active duty after January 1, 1968, from that employment and has not been released from that duty prior to the effective date of this Act; or

(2) is on active duty under section 265, 3015, 3033, 3496, 8033 or 8496 of title 10, United States Code, on the effective date of this Act;

and was covered by a retirement system or plan of a State or the Commonwealth of Puerto Rico, may, if he is reemployed within sixty days under section 709 of title 32, United States Code, make the election described in subsection (a) of this section, within thirty days following the date of his reemployment.

(c) In the case of any person who files a valid election under this section to remain covered by an employee retirement system of, or plan sponsored by, a State or the Commonwealth of Puerto Rico, the United States may pay the amount of the employer's contributions to that system or plan that become due for periods beginning on or after the effective date of this Act. However, the payment by the United States, including any contribution that may be made by the United States toward the employer's tax imposed by section 3111 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 3111), may not exceed the amount which the employing agency would otherwise contribute on behalf of the person to the Civil Service Retirement and Disability Fund under section 8334(a) of title 5, United

States Code. Notwithstanding section 8332(b) of title 5, Untied States Code, as amended by section 5 of this Act, the service under section 709 of title 32, United States Code, or prior corresponding provision of law, of a person who has made an election to remain covered by the employee retirement system of, or plan sponsored by, a State or the Commonwealth of Puerto Rico, shall not be creditable toward eligibility for or amount of annuity under subchapter III of chapter 83 of title 5, United States Code. A person who retires pursuant to his valid election shall not be eligible for any rights, benefits, or privileges to which retired civilian employees of the United States may be entitled.

SEC. 7. The fourth sentence of section 218(b)(5) of the Social Security Act, as amended (42 U.S.C. 418(b)(5)), is amended to read as follows: "Persons employed under section 709 of title 32, United States Code, who elected under section 6 of the National Guard Technicians Act of 1968 to remain covered by an employee retirement system of, or plan sponsored by, a State or the Commonwealth of Puerto Rico, shall, for the purposes of this Act, be employees of the state or the Commonwealth of Puerto Rico and (notwithstanding the preceding provisions of this paragraph), shall be deemed to be a separate coverage group.".

SEC. 8. (a) Except as provided in section 709(g) of title 32, United States Code, the Secretary concerned shall fix the rate of basic compensation of positions existing on the date of enactment of this Act in accordance with the General Schedule set forth in section 5332, or under the appropriate prevailing rate schedule in accordance with section 5341 of title 5, United State Code, as applicable. In fixing such rate --

(1) If the technician is receiving a rate of basic compensation which is less than the minimum rate of the appropriate grade of the General Schedule,

or which is less than the minimum rate of the appropriate grade or compensation level of the appropriate prevailing rate schedule, as applicable, in which his position is placed, his basic compensation shall be increased to that minimum rate.

(2) If the technician is receiving a rate of basic compensation which is equal to a rate of the appropriate grade of the General Schedule, or which is equal to a rate of the appropriate grade or compensation level under the appropriate prevailing rate schedule, as applicable, in which his position is placed, he shall receive basic compensation at that rate of the General Schedule, or at that rate under the prevailing rate schedule, as applicable.

(3) If the technician is receiving a rate of basic compensation which is between two rates of the appropriate grade of the General Schedule, or which is between two rates of the appropriate grade or compensation level under the appropriate prevailing rate schedule, as applicable, in which his position is placed, he shall receive basic compensation at the higher of those two rates under the General Schedule or appropriate prevailing rate schedule, as applicable.

(4) If the technician is receiving a rate of basic compensation which is in excess of the maximum rate of the appropriate grade of the General Schedule, or which is in excess of the maximum rate of the appropriate grade or compensation level of the appropriate prevailing rate schedule, as applicable, in which his position is placed, he shall continue to receive basic compensation without change in rate until --

(A) he leaves that position, or

(B) he is entitled to receive basic compensation at a higher rate,

but when any such position becomes vacant, the rate of basic compensation of any subsequent appointee thereto shall be fixed in the manner provided by applicable law and regulation.

(b) The conversion of positions and employees to appropriate grades of the General Schedule set forth in section 5332 of title 5, United States Code, and the initial adjustment of rates of basic compensation of those positions and technicians, provided for by this Act, shall not be considered to be transfers or promotions within the meaning of section 5334(b) of title 5, United States Code, and the regulations issued thereunder.

(c) Each technician on the effective date of this Act whose position is converted to the General Schedule set forth in section 5332 of title 5, United States Code, or to the appropriate prevailing rate schedule, as applicable, who prior to the initial adjustment of his rate of basic compensation under subsection (a) of this section, has earned, but has not been credited with, an increase in that rate, shall be granted credit for such increase before his rate of basic compensation is initially adjusted under that subsection.

(d) Each technician on the effective date of this Act whose position is converted to the General schedule set forth in section 5332 of title 5, United States Code, or to the appropriate prevailing rate schedule, as applicable, shall be granted credit, for purposes of his first step increase under the General Schedule or prevailing rate schedule, for all satisfactory service performed by him since his last increase in compensation prior to the initial adjustment of his rate of basic compensation under subsection (a) of this section.

(e) An increase in rate of basic compensation by reason of the enactment of subsection (a) of this section shall not be considered to be an equivalent increase with respect to step increases for technicians whose positions are converted to the General Schedule set forth in section 5332 of title 5, United States Code, or the appropriate prevailing rate schedule under authority of this section.

SEC. 9. Title 10, United States Code, is amended as follows:

(1) Sections 3848(c) and 3851(c) are each amended to read as follows:

"(c) Notwithstanding subsections (a) and (b) of this section, the Secretary of the Army may authorize the retention in an active status until age 60 of any officer of the Army National Guard of the United States who would otherwise be removed from an active status under this section and who --

"(1) is assigned to a headquarters or headquarters detachment of a State or territory, the Commonwealth of Puerto Rico, the Canal Zone, or the District of Columbia; or

"(2) is employed as a technician under section 709 of title 32, United States Code, in a position for which Army National Guard membership is prescribed by the Secretary."

(2) Sections 8848 and 8851 are each amended by adding the following new subsection:

"(c) Notwithstanding subsections (a) and (b) of this section, the Secretary of the Air Force may authorize the retention in an active status until age 60 of any officer of the Air National Guard of the United States who would

otherwise be removed from an active status under this section and who is employed as a technician under section 709 of title 32, United States Code, in a position for which Air National Guard membership is prescribed by the Secretary."

SEC. 10. Regulations prescribed by the Secretary of the Army and Secretary of the Air Force under this Act shall be approved by the Secretary of Defense and shall, so far as practicable, be uniform.

SEC. 11. This Act becomes effective January 1, 1969, except that no deductions or withholding from salary which result therefrom shall commence before the first day of the first pay period that begins on or after January 1, 1969.

Ernest H. Mackey et al., Plaintiffs v. John Stetson et al., Defendants.

Civil Action No. C-C-7-124.

United States District Court, Western District of North Carolina, Charlotte Division.

18 Empl. Prac. Dec. (CCH) P8778

October 5, 1978.

COUNSEL: Louis L. Lesesne, Jr. (Chambers, Stein, Ferguson & Becton), Charlotte, North Carolina, for Plaintiff.

Wayne C. Alexander, Assistant United States Attorney, for Defendant.

OPINION BY: McMILLAN

OPINION: McMILLAN, D.J.: On October 2, 1978, the court heard argument from counsel, in chambers, on defendants' motion to limit the scope of evidence that plaintiffs would be allowed to present at trial and on the question of class redefinition.

This action was brought under 42 U.S.C. § 2000e-16 against the Air National Guard, alleging discrimination in the operation of its Charlotte facility. The thrust of the complaint is that defendants' practices with respect to the hiring and promotion of technicians are racially discriminatory. The parties agree that technicians are employees of the National Guard who must, by virtue of statute (32 U.S.C. § 709), also be commissioned in the National Guard. At the hearing and in their memoranda on the class certification issue, defendants have conceded that technicians are within the class of federal employees

protected from race discrimination in employment under 42 U.S.C. § 2000e-16. This conclusion follows from a consideration of 5 U.S.C. § 2015(a).

The parties' disagreement arises from the congressional mandate that all technicians also be commissioned in the Guard. Defendants argue that the policies and practices of the National Guard in its enlistment of civilian personnel and granting of military promotions are military matters affecting the armed forces rather than civil service matters affecting employees and are therefore beyond the scope of 42 U.S.C. § 2000e-16. See 5 U.S.C. § § 2105(a) and 2101, 10 U.S.C. § 261. On this basis, defendants assert that the court should limit the scope of evidence that plaintiffs can introduce at trial to exclude evidence relating to these policies and practices and to narrow the scope of the class previously certified to exclude all persons who do not have specific claims regarding hiring into or advancement within the technician program.

Although it appears that this court does not have jurisdiction to review "military" employment decisions of defendants, the inclusion of National Guard technicians within the scope of protected employees of 42 U.S.C. § 2000e-16 clearly suggests a congressional intent that the court have the power to inquire into all relevant employment practices and to accord some measure of effective relief when liability is found. While there may be, as defendants suggest, jurisdictional limitations on the scope of that relief, it does not follow that the inquiry at trial should be similarly limited when the same evidence is relevant to the liability issue. Since the policies followed by defendants in the employment of technicians is inextricably related to their threshold decisions regarding the employment of civilians as guardsmen, evidence relating to those latter practices should not be mechanically excluded at this stage.

It is not now clear whether the class as presently constituted should be redefined. As defendants suggest, many of those now included under its terms may ultimately be found not to have claims for which this court can provide a remedy without overstepping its jurisdictional bounds. A redefinition of the class at this stage, however, would be premature.

It is Therefore Ordered that defendants' motion to delimit the scope of evidence plaintiffs may produce at trial is denied; the court defers any ruling on the redefinition of the class until trial.

WILLIAM R. KOSTAN, Appellant, v. ARIZONA NATIONAL GUARD, Agency, and NATIONAL GUARD BUREAU, Intervenor.

DOCKET NUMBER DE03538910188

50 M.S.P.R. 182; 1991 MSPB LEXIS 1297

August 29, 1991

[*1]

Joseph E. Abodeely, Esquire, Phoenix, Arizona for the appellant.

Colonel Victor Schwanbeck, Esquire, Tucson, Arizona, for the agency.

Jerome M. Mellody, Esquire, Washington, D.C., for the intervenor.

OPINION:

BEFORE

Daniel R. Levinson, Chairman

Antonio C. Amador, Vice Chairman

Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board pursuant to the remand order of the United States Court of Appeals for the Federal Circuit. *Kostan v. Arizona National Guard*, No. 90-3396 (Fed. Cir. Dec. 27, 1990). Having fully considered the parties' submissions on remand, we REVERSE our prior decision dismissing the appeal for lack of jurisdiction and

REMAND the case to the Denver Regional Office for adjudication on the merits.

BACKGROUND

The appellant was employed by the Arizona National Guard as a GS-12 Technician. In 1985, he was granted a military furlough from the agency and entered into active duty with the United States Air Force. In 1989, the appellant ended his tour of duty with the Air Force and was restored to a GS-12 position with the agency in Phoenix, Arizona. The appellant filed an appeal with the Board's Denver Regional Office, contending [*2] that he should have been restored to a GS-13 position in Tucson, Arizona. The administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction on the ground that a National Guard technician does not hold a position in a Federal agency, as required by the regulations governing the Board's jurisdiction over restoration claims. *Kostan v. Arizona National Guard*, MSPB Docket No. DE03538910188 (Initial Decision, June 2, 1989).

On review to the full Board, the National Guard Bureau, intervening under 5 C.F.R. § 1201.34(c), supported the Arizona National Guard's position that the Board lacked jurisdiction to review a restoration claim brought by a National Guard technician. Relying on its decision in *Gordon v. Massachusetts National Guard*, 42 M.S.P.R. 251 (1989), n1 the Board affirmed the initial decision, finding that the appellant had no right of appeal under 5 C.F.R. § 353.401 because he did not hold a position in a Federal agency. *Kostan v. Arizona National Guard*, 45 M.S.P.R. 173 (1990). On appeal to the Court of Appeals for the Federal Circuit, the intervenor reversed its position, arguing that the Board does have jurisdiction over restoration [*3] claims brought by National Guard technicians. The court remanded the case to the Board to consider the intervenor's arguments.

n1 *Gordon* was decided after the initial decision in *Kostan* was issued.

ANALYSIS

National Guard technicians are employees of an agency in the executive branch who may appeal a restoration claim to the Board.

The substantive rights of individuals returning from Federal military service to be restored to the jobs they held prior to entering into military service are contained in chapter 43 of title 38 of the United States Code, sections 2021-2026. Chapter 43 specifies the enforcement procedures to be used by a veteran who believes he was not properly restored to his former employment by a private employer or a state or local government employer. 38 U.S.C. § 2022. With respect to individuals who left Federal civilian employment to enter military service, the statute authorizes the Director of the Office of Personnel Management (OPM) "to issue regulations giving full force and effect to the provisions of this section insofar as they relate to persons entitled to be restored to or employed in positions in the executive branch of the [*4] Government. . . ." 38 U.S.C. § 2023(a). OPM has exercised this authority by promulgating Part 353 of title 5, Code of Federal Regulations. These regulations provide that "an employee or former employee of an agency in the executive branch . . . may appeal to the [Merit Systems Protection Board] an agency's failure to restore or improper restoration." 5 C.F.R. § 353.401(a) (1991). n2

n2 This regulation formerly provided that an employee who left a position "in an agency" to enter military service had a right to appeal to the Board. See 5 C.F.R. § 353.401(a) (1988). As we stated in *Sanford v. Connecticut National Guard*, 45 M.S.P.R. 576, 579 (1990), this minor

difference in wording did not affect the scope of the Board's jurisdiction.

The National Guard Technicians Act of 1968 n3 granted National Guard technicians, previously considered state employees, Federal employee status: "A technician . . . is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States." 32 U.S.C. § 709(d). Even though the Departments of the Army and Air Force are clearly Federal agencies within the meaning of the restoration [*5] statue and regulations, n4 the Board concluded in Gordon that technicians are Federal Employees who hold positions in state organizations, and that they are therefore not entitled under 5 C.F.R. § 353.401(a) to file a restoration appeal with the Board. 42 M.S.P.R. at 255. In reaching this conclusion, the Board first considered the unique status of state National Guards and National Guard technicians in our Federal structure:

The National Guard . . . is "an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war," and "also may be federalized in addition to its role under state governments, to assist in controlling civil disorders." As the successor to the state militias of the nation's early years, the Guard fills a role recognized and provided for in the United States Constitution. This role does not fit neatly with the scope of either state or national concerns; historically the Guard has been, and today remains, something of a hybrid. Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup, and function of the Guard are provided for, to [*6] a large extent, by federal law.

n3 Pub. L. No. 90-486, 82 Stat. 755 (codified at 32 U.S.C. § 709).

n4 The statute defines the term "agency in the executive branch of the Government" as "any department, independent establishment, agency, or corporation in the executive branch of the Untied States Government (including the United States Postal Service and the Postal Rate Commission)." 38 U.S.C. § 2023(a). The definition of "agency" contained in OPM's regulations is virtually identical. *See* 5 C.F.R. § 353.102.

Mirroring this special posture of the Guard is the peculiar status of its employees. In addition to purely military personnel, the Guard employs civilians to perform a wide range of administrative, clerical, and technical tasks. Often the responsibilities and duties of these employees, who are generally referred to as National Guard technicians, correspond directly to those of other civilian employees, yet they arise in a distinctly military context, implicating significant military concerns.

Gordon, 42 M.S.P.R. at 253-54 (quoting *Special Counsel v. Everett*, 28 M.S.P.R. 348, 350 (1985)).

The Board next considered the limited purposes for which Congress [*7] deemed technicians to be Federal employees and the restrictions on Federal control contained in the 1968 Act:

According to the legislative history, the purpose of granting technicians Federal employee status was twofold: To provide a uniform and adequate retirement and fringe benefit program, and to bring technicians within the coverage of the Federal Tort Claims Act regarding third party actions against the United States.

While the Act made the technicians Federal employees, the adjutants general of the various states retain the authority to employ and administer the technicians. 38 U.S.C. § 709(c). In addition, technicians may not appeal

certain personnel actions beyond the state adjutant general, and the adverse action protections of chapter 75 of Title 5 do not apply to technicians. 38 U.S.C. § 709(e), (f). These provisions were intended to "recognize the State character of the Guard" and to "meet the requirement of giving the adjutants general (who are State officers) the statutory function of employing Federal employees."

Gordon, 42 M.S.P.R. at 255 (some citations deleted).

The Board concluded that, notwithstanding the fact that technicians are Federal employees [*8] by virtue of 32 U.S.C. § 709, they hold positions in the state National Guards, which are state organizations not included within the definition of agency contained in 5 C.F.R. § 353.102, and that they therefore have no right of appeal under 5 C.F.R. § 353.401(a). 42 M.S.P.R. at 255.

When the instant case was appealed to the Federal Circuit, the intervenor brought to the attention of the court an uncodified provision of the National Guard Technicians Act that was not considered in Gordon:

Except as provided in this act and in the amendments made by this Act, and notwithstanding any law, rule, regulation, or decision to the contrary, the positions of persons employed under section 709 of title 32, United States Code, existing on the day before the effective date of this Act, and the persons holding those positions on that day, shall, on and after that effective date, be considered to be positions in and employees of the Department of the Army or the Department of the Air Force, as the case may be, and employees of the United States to the same extent as other positions in and employees of the Department of the Army or the Department of the Air Force.

Pub. L. No. 90-486, [*9] § 3(b), 82 Stat. 755, 757 (1968) (emphasis added).

Although the primary concerns prompting the enactment of the 1968 Act were the lack of a uniform and adequate retirement and fringe benefit program, and the question of the technicians' legal status under the Federal Tort Claims Act, the language employed in section 3(b) establishes conclusively that technicians are not to be considered as Federal employees for these purposes only. Despite the fact that they work for state organizations under the authority of a state official, technicians must be considered as civilian employees of the Departments of the Army or Air Force who possess all the rights held by other Army and Air Force employees, save those rights specifically denied them in the National Guard Technicians Act.

The Act specifies only four situations in which technicians have lesser rights than other Army and Air Force employees: (1) separation from civilian employment in instances involving loss of a required military Guard membership or a military grade specified for the position; (2) separation from civilian employment as a result of failure to meet military security standards; (3) separation for cause by the adjutant [*10] general; and (4) reduction in force or adverse action involving discharge, suspension, furlough without pay, or reduction in rank or compensation. 32 U.S.C. § 709(e). In each of these instances, a technician's right of appeal does not extend beyond the adjutant general of the jurisdiction involved. *Id.*

Restoration claims under 38 U.S.C. §§ 2021-2026 do not fall within any of the above exceptions. Accordingly, we conclude that a technician must be considered as a civilian employee of the Department of the Army or Air Force, and thus an "employee of an agency in the executive branch" who has the same right as other civilian employees of the Army and Air Force to appeal a failure to restore or improper restoration under 5 C.F.R. § 353.401(a). The Board's contrary holding in *Gordon* is hereby overruled. n5

n5 The Board reinforced its holding in *Gordon* by reference to its enforcement authority, which is limited to orders directed to Federal agencies and employees. Noting that a state National Guard is a state organization, and that the adjutant general -- the only person authorized by law to employ a technician -- is a state official, the Board found it incongruous for the Board to have jurisdiction to adjudicate the appellant's entitlement to restoration, but no authority to ensure compliance with that adjudication. 42 M.S.P.R. at 255. This concern remains troubling, but we find it an inadequate basis for deciding the jurisdictional issue, which is the only issue before the Board at this time. [*11]

Remand to the regional office for an adjudication on the merits is appropriate.

In his initial decision, the administrative judge found in the alternative that, even if the Board had jurisdiction over the appeal, the appellant's allegations regarding his restoration were without merit. On review, the Board found that the administrative judge should not have made this finding because it was not required to resolve the issue of jurisdiction. 45 M.S.P.R. at 178. The Board found that the administrative judge's error was harmless, however, because it did not affect the appellant's substantive rights. *Id.* The Board also found that the administrative judge properly denied the appellant's request that he be allowed to obtain documents through discovery because the documents sought related to the merits of his restoration claim, not to jurisdiction. It noted in this regard that the administrative judge had stated that, should he find that the Board had jurisdiction over the appeal, he would set a period of time for the parties to engage in discovery. *Id.*

Having now determined that the Board does have jurisdiction over the appeal, we find it appropriate to remand the [*12] case to the regional office for further adjudication,

to include an opportunity for the parties to engage in discovery, and a hearing if requested by the appellant.

Supreme Court, U.S.
FILED
FEB 26 1996
CLERK

No. 95-816

In the Supreme Court of the United States

OCTOBER TERM, 1995

ARTHUR J. MIER, PETITIONER

v.

GLEN W. VAN DYKE, ADJUTANT GENERAL, ARIZONA ARMY NATIONAL GUARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, does not authorize judicial consideration of a National Guard technician's challenge to a personnel action integrally related to the military's structure.

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-3 to A-14) is reported at 57 F.3d 747. The order of the district court (Pet. App. A-15 to A-17) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1995. A petition for rehearing was denied on August 24, 1995. Pet. App. A-1 to A-2. The petition for a writ of certiorari was filed on November 21, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a Hispanic civil service technician employed in the Arizona Army National Guard (ARNG). National Guard technicians are full-time, uniformed employees who render services that advance the Guard's mission, such as maintenance of military equipment and facilities, support of aircraft operations, and clerical functions. See *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 101 (3d Cir. 1986), cert. denied, 484 U.S. 815 (1987).[1]

National Guard technicians have a hybrid employment status. They are federal civilian employees under the authority and control of their respective state adjutant generals; they are also members of the National Guard of the United States. See note 1, *supra*. Petitioner's position requires him to serve in a military capacity as a uniformed, commissioned Army officer not on active duty, and in a civilian capacity as a supply management officer responsible for providing and maintaining supplies for the ARNG.

---

[1] The National Guard of the United States is a reserve component of the Army and Air Force, see 10 U.S.C. 101(11) and (13) (Supp. V 1993), 32 U.S.C. 709(d). It is "an integral part of the first line defenses of the United States," 32 U.S.C. 102, that provides "trained units and qualified persons available for active duty in the armed forces in time of war or national emergency and at such other times as the national security requires." 10 U.S.C. 262. The command relationship among National Guard members is identical in structure to the command relationship among its active duty federal counterparts. See generally *Perpich* v. *Department of Defense*, 496 U.S. 334, 345-354 (1990); *Gilligan* v. *Morgan*, 413 U.S. 1, 7 (1973); E. Roy Hawkens, *The Justiciability of Claims Brought By National Guardsmen Under the Civil Rights Statutes*, 125 Mil. L. Rev. 99, 102-105 (1989).

In order to remain in his civilian position, petitioner must be a member of the ARNG and hold the commensurate federal military position. See 32 U.S.C. 709(b); Pet. App. A-7.

2. In 1992, petitioner brought this suit against the ARNG and the Department of the Army (respondents) under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, alleging that respondents discriminated against him on the basis of race, color, and national origin. Petitioner alleged that respondents denied him military promotions, investigated him for alleged wrongdoing, and placed him on involuntary administrative leave, solely because of his race. He also alleged that respondents retaliated against him for having filed an administrative discrimination complaint with the Army in 1986. Pet. App. A-7.

3. The district court dismissed the action. First, the court held that it lacked jurisdiction over petitioner's claims because Title VII "is not applicable to uniformed members of the armed forces" (Pet. App. A-16), and the "military aspect" of petitioner's position "predominate[s]" (*ibid.*) in his Title VII suit. Second, the court held that petitioner's claims were premature because he had not yet exhausted available intramilitary remedies. *Id.* at A-17. Finally, the court held that petitioner's claims were not justiciable as a prudential matter in light of the extent of military expertise and discretion involved in the challenged decisions, the danger of unwarranted judicial interference with the military function, and the availability of administrative remedies. *Ibid.*

4. The court of appeals affirmed.[2] The court observed (Pet. App. A-9) that a variety of employment actions involving military personnel, including National Guard members, are not judicially reviewable. In those contexts, separation of powers concerns counsel against judicial interference with the "relationship between enlisted military personnel and their superior officers . . . [which] is at the heart of the necessarily unique structure of the Military Establishment." *Ibid.*

Construing circuit precedent,[3] the court concluded that "[b]ecause Guard technicians are in a hybrid job entailing both civilian and military aspects, * * * Title VII coverage of civilians employed by the military encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure." Pet. App. A-11. Where the challenged personnel action is "inherently military" (*id.* at A-10), the

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[2] During the pendency of petitioner's appeal, another military promotion board convened, and petitioner was promoted to the rank of major. Gov't C.A. Br. 10-11.

[3] See *Christoffersen* v. *Washington State Air National Guard*, 855 F.2d 1437, 1444 (9th Cir. 1988) (suit brought by National Guard technician under 42 U.S.C. 1983 challenging discharge decision by the Guard and termination from technician employment is not justiciable because judicial review "would seriously impede the military in performance of its vital duties"), cert. denied, 490 U.S. 1098 (1989); *Gonzalez* v. *Department of the Army*, 718 F.2d 926, 928 (9th Cir. 1983) (Title VII applies to civilian employees of the military, but not to military personnel); *Bledsoe* v. *Webb*, 839 F.2d 1357, 1360 (9th Cir. 1988) (Title VII claim challenging refusal to allow a female civilian employee to embark on a naval carrier is not so "inherently military" as to be nonjusticiable).

court held, a Guard technician's claim is not justiciable.

Applying that test, the court affirmed the dismissal of petitioner's Title VII suit. The court determined that petitioner's allegation that respondents discriminatorily failed to promote him to the rank of major "is one of the most obvious examples of a personnel action that is integrally related to the military's structure" (Pet. App. A-12) and is not, therefore, reviewable under Title VII. The court further held that "[b]ecause [petitioner's] suspension from civilian promotion resulted from denial of the military promotion, the suspension likewise cannot be reviewed." *Ibid.* Similarly, the court held, petitioner's retaliation claims are unreviewable, because they were linked to respondents' promotion and suspension decisions. *Id.* at A-13. Finally, the court held that petitioner's contention that respondents discriminated against him when they investigated him for alleged wrongdoing was not reviewable under Title VII because "[i]nvestigation is an act central to the military's unique concerns regarding discipline and control." *Ibid.*[4]

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[4] In a concurring opinion, Judge Rhymer stated that the "only issue before us, and all that we rightfully decide, is whether a Guard technician's challenge to personnel actions integrally related to the military's unique structure is cognizable under Title VII. For the reasons [set out in the majority opinion], I agree that such a challenge fails." Pet. App. A-14.

Judge Reinhardt filed an opinion concurring in part and dissenting in part. He agreed that National Guard technicians may not bring Title VII claims challenging decisions that are integrally related to the military aspect of their job. Pet. App. A-13. He would have reversed the district court's dismissal of petitioner's action, however, and remanded the case for further factual development. *Id.* at A-14.

ARGUMENT

1. Petitioner urges the Court to grant review in this case in order to consider "whether Title VII * * * applies to National Guard technicians." Pet. 4. The court of appeals expressly held, however, that the position of National Guard technician *is* covered by Title VII. Pet. App. A-6, A-11. The court rejected petitioner's particular claims because they involve conduct that is "integrally related to the military's unique structure." *Id.* at A-11. The question of statutory coverage of National Guard technicians is therefore not presented in this case.[5] Even if disagreement existed among the courts of appeals regarding the applicability of Title VII to persons in petitioner's position, this case would not implicate that conflict.

Petitioner is, in all events, incorrect in asserting that a circuit conflict exists regarding the applicability of Title VII to the position of National Guard technician. See Pet. 5-8, citing *Taylor* v. *Jones*, 653 F.2d 1193 (8th Cir. 1981); *Stinson* v. *Hornsby*, 821 F.2d 1537 (11th Cir. 1987), cert. denied, 488 U.S. 959 (1988); *Thornton* v. *Coffey*, 618 F.2d 686 (10th Cir. 1980). In *Taylor* v. *Jones*, the plaintiff had served in the Arkansas Army National Guard both as a recruiter and as a mailroom clerk. 653 F.2d at 1197. The court of appeals held that she was protected under Title VII in her capacity as mailroom clerk, *id.* at 1198, but that she could not invoke Title VII with regard to alleged discrimination incident to her duties as a recruiter. *Id.* at 1200. In the latter capacity, the court observed,

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[5] Petitioner appears to acknowledge as much when he argues that "[t]o the extent the Ninth Circuit found Title VII applicable, its opinion should be affirmed." Pet. 24.

the plaintiff was on full-time military duty with the Guard, was under the command of state military authority, and was subject to court-martial. *Ibid.* In *Taylor*, as in the present case, the court thus found that Title VII does not afford Guard members protection in contexts that are distinctly military in nature. *Ibid.*[6]

In *Stinson* v. *Hornsby*, the plaintiff was on full-time military duty with the Alabama National Guard, pursuant to 32 U.S.C. 502(f),[7] during the period in which the alleged misconduct occurred. 821 F.2d at 1538-1539. Following *Taylor* v. *Jones*, and *Gonzalez* v. *Department of the Army*, 718 F.2d 926 (9th Cir. 1983), the court found that the plaintiff's role and susceptibility to military discipline during the period at issue placed him in the status of a member of the "armed forces," rather than that of an "employee,"

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[6] The court in *Taylor* went on to hold that the plaintiff was entitled to relief under 42 U.S.C. 1981 for intentional discrimination that occurred in the course of her duties as a recruiter. 653 F.2d at 1200-1202.

[7] Section 502(f) provides, in pertinent part:

> Under regulations to be prescribed by the Secretary of the Army or Secretary of the Air Force, as the case may be, a member of the National Guard may—
>
> (1) without his consent, but with the pay and allowances provided by law; or
>
> (2) with his consent, either with or without pay and allowances;
>
> be ordered to perform training or other duty in addition to [his regularly scheduled drills and periods of active duty].

and that Title VII relief was therefore unavailable. 821 F.2d at 1539.[8]

Finally, in *Thornton* v. *Coffey*, the court upheld the application of Title VII to the Oklahoma National Guard's failure to hire the plaintiff for "a civilian job" as equal employment officer. 618 F.2d at 689. The court held that relief was precluded, however, as to claims "based directly or indirectly" on the plaintiff's failure to receive a military promotion. *Id.* at 693. Thus, as petitioner acknowledges (Pet. 6), the analysis in *Thornton* "closely parallels" the decision below.

2. The court of appeals correctly held that "Title VII coverage of civilians employed by the military encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure." Pet. App. A-11.

Petitioner correctly observes (Pet. 19-23) that the courts of appeals have differed in their treatment of the question of the justiciability of military disputes in some contexts.[9] In the context of Title VII suits

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[8] The court distinguished cases such as *Calhoun* v. *Doster*, 324 F. Supp. 736 (M.D. Ala. 1971), in which the plaintiff "held two separate and identifiable positions: one as a civilian employee and the other as military personnel." 821 F.2d at 1540 n.2.

[9] See, *e.g.*, *Wright* v. *Park*, 5 F.3d 586 (1st Cir. 1993) (finding claims under 42 U.S.C. 1983 and 1985, 5 U.S.C. 2301-2302 (1988 & Supp. V 1993), and state law to be nonjusticiable); *Knutson* v. *Wisconsin Air National Guard*, 995 F.2d 765 (7th Cir.) (Section 1983 claim nonjusticiable), cert. denied, 114 S. Ct. 347 (1993); *Jorden* v. *National Guard Bureau*, 799 F.2d 99 (3d Cir. 1986) (Section 1983 claim for injunctive relief justiciable), cert. denied, 484 U.S. 815 (1987); *Trerice* v. *Summons*, 755 F.2d 1081 (4th Cir. 1985) (*Bivens* claim barred by doctrine of

by National Guard technicians at issue here, however, the courts of appeals have uniformly held that technicians may not challenge adverse personnel decisions that are integrally related to the military's unique structure. See *Stinson* v. *Hornsby*, 821 F.2d at 1539-1540; *Taylor* v. *Jones*, 653 F.2d at 1200; *Thornton* v. *Coffey*, 618 F.2d at 692.

3. The court of appeals' holding is also consistent with this Court's decisions regarding the justiciability of disputes arising from the military's unique internal structure. The Court has frequently stated that substantial discretion must be afforded to the military in molding an effective fighting force. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348, 360 (1980). "To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life." *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975). Accordingly, the Court has been reluctant to intervene in any matter that "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." *United States* v. *Shearer*, 473 U.S. 52, 58 (1985) (footnote omitted). The "complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. at 10.

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intramilitary immunity); *Schultz* v. *Wellman*, 717 F.2d 301 (6th Cir. 1983) (reviewing Section 1983 claim for reinstatement).

In light of those principles, the court of appeals correctly declined to presume that a remedial statute of general applicability in civilian contexts applies identically to military decisions. See *Feres* v. *United States*, 340 U.S. 135 (1950) (declining to apply Federal Tort Claims Act to suits by service members for service-related injuries); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953) (declining to review propriety of duty assignment); *Burns* v. *Wilson*, 346 U.S. 137 (1953) (plurality opinion) (giving narrow interpretation to scope of federal habeas corpus relief available to service member); *Gilligan* v. *Morgan*, 340 U.S. 135 (1950) (declining to assume jurisdiction over claims implicating training, weaponry, and orders of National Guard); *Schlesinger* v. *Councilman*, *supra* (limiting ability of service member to obtain injunctive relief for alleged wrongs, including constitutional violations).

4. Contrary to petitioner's suggestion (Pet. 27), the conclusion that he may not pursue his claims of discrimination incident to military service under Title VII does not leave National Guard members without a meaningful remedy when they allege instances of individual or systemic discrimination. Avenues of administrative and judicial relief are available for Guard members who allege that they have suffered unlawful discrimination.[10]

For example, National Guard Regulation (AR) 600-21 (1993) prohibits discriminatory treatment and provides procedures for formal investigation where a

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[10] In addition, the court of appeals' decision acknowledges that a Title VII remedy is available to a National Guard technician who challenges a personnel decision that is not integrally related to military service. Pet. App. A-11.

Guard member claims to have suffered discrimination. The National Guard Bureau, a joint bureau of the United States Departments of the Army and Air Force, see 10 U.S.C. 10501, is empowered to review investigations conducted by state National Guard units regarding claims of discrimination. Where the Bureau's "administrative review reveals deficiencies in compliance with law or regulation, the case will be returned to the State for appropriate corrective action." National Guard Regulation 600-21, appendix E, subsection (g).[11]

Guard members may also seek relief for alleged incidents of discrimination from the Board of Correction of Military Records (BCMR). The Secretary of the Army, acting through the BCMR, is vested with plenary power to "correct an error or remove an injustice." 10 U.S.C. 1552 (1988 & Supp. V 1993). In appropriate cases, the BCMR may order that a Guard member be reinstated in comparable active federal reserve status and awarded retroactive promotion and back pay. See *Christoffersen*, 855 F.2d at 1442; *Williams* v. *Wilson*, 762 F.2d 357, 360 & n.6 (4th Cir. 1985).

If a service member believes that the BCMR failed to provide adequate relief, he or she may then seek redress in federal court. BCMR decisions are subject to judicial review under the Administrative Procedure Act (APA), 5 U.S.C. 551-559 (1988 & Supp.

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[11] See also 32 U.S.C. 709(e)(5) (1988 & Supp. V 1993) (providing right of appeal to state Adjutant General for National Guard technicians who are terminated from employment); 10 U.S.C. 938 (providing service members, including Guard members in federal service, with an administrative procedure for asserting grievances and seeking redress for alleged injuries by superior officers).

V 1993). BCMR decisions may be set aside if they are arbitrary, capricious, or not based on substantial evidence. See *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983). Petitioner failed to utilize any of these remedies. Pet. App. A-17.

5. Finally, petitioner's[1] contentions that "the Ninth Circuit construed the allegations of the complaint too narrowly" (Pet. 24), and that the personnel decisions at issue here do not implicate military discipline and readiness issues (Pet. 24-25) concern the particular facts of this case and do not warrant further review.[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12] Nor, contrary to petitioner's contention (Pet. 26), is certiorari warranted to resolve allegedly inconsistent decisions of the Ninth Circuit. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).